(10)

No. 00-853-CFX Title: Correction Officer Porter, et al., Petitioners
v.
Ronald Nussle

Docketed: November 28, 2000 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Nov 22 2000	Petition for writ of certiorari filed. (Response due December 28, 2000)
	Dec 18 2000	Waiver of right of respondent Ronald Nussle to respond filed.
	Dec 20 2000	DISTRIBUTED for Conference of January 5, 2001
	Jan 2 2001	Response requested.
	Jan 31 2001	Brief of respondent Ronald Nussle in opposition filed.
	Feb 14 2001	REDISTRIBUTED for Conference of March 2, 2001
	May 25 2001	REDISTRIBUTED for Conference of May 31, 2001
	Jun 4 2001	Petition GRANTED. SET FOR ARGUMENT January 14, 2002. **********
	Jul 3 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 20, 2001.
	Aug 9 2001	Joint appendix filed.
	Aug 20 2001	Brief of petitioners Correction Officer Porter and Correction Officer Willette filed.
	Aug 20 2001	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Aug 20 2001	Brief amici curiae of New York, et al. filed.
	Aug 20 2001	Brief amicus curiae of United States filed.
	Sep 19 2001	Brief of respondent Ronald Nussle filed.
	Oct 4 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 24 2001	Reply brief of petitioner Porter (TBP) filed.
	Oct 29 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 8 2001	CIRCULATED.
	Nov 29 2001	Record filed.
	Jan 14 2002	ARGUED.

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No. _____

In The
Supreme Court Of The United States

October Term, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE

Petitioners,

v.

RONALD NUSSLE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Legal Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?

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LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiff was Ronald Nussle.

In both courts below, the defendants are listed as Correction Officer Willette and Correction Officer Porter.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE

Petitioners,

v.

RONALD NUSSLE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Correction Officer Porter and Correction Officer Willette[1/] pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

1/ The Connecticut Attorney General appeared for both Correction Officer Porter and Correction Officer Willette in their official capacities, to the extent the plaintiff sought relief against state officials, but appeared only for Correction Officer Porter individually inasmuch as it was determined that there was no Correction Officer named Willette.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on August 24, 2000, is reported at *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), and is printed in the appendix to this petition at App. A-1.

The memorandum of decision of the United States District Court for the District of Connecticut, *Nevas, J.*, dated November 22, 1999, is unreported, but is printed in the appendix to this petition at App. A-22.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Court of Appeals' ruling dated August 24, 2000. Supreme Court Rule 13.1; 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

[REPRINTED IN APPENDIX]

STATEMENT OF THE CASE

The respondent-plaintiff alleges that on June 15, 1996, while an inmate at the Cheshire Correctional Institute, the petitioners-defendants, acting under color of law, and jointly and in concert with each other, beat him without justification. (Complaint, ¶¶10-11) He claims that the petitioners beat him because he was a friend of Gov. John G. Rowland. (*Id.* ¶9) The respondent further alleges that he "was told that if he reported this beating the guards would kill him." (*Id.* ¶12)

On June 10, 1999, just days before the three year statute of limitations lapsed; *see Williams v. Walsh*, 558 F.2d 667, 670 (2d Cir. 1977); the respondent filed this suit against the petitioners. The respondent's complaint did not allege that he had exhausted his available administrative remedies, and in fact he had not.[2/]

On August 20, 1999, the petitioners moved to dismiss this action for failure to exhaust the respondent's administrative remedies, as required by the Prison Legal Reform Act, of 1995, Pub. L. No. 104-134, 110 State. 1321-73 (1996) ("PLRA"), 42 U.S.C. § 1997e(a). On

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2/ Administrative Directive 9.6, promulgated by the Connecticut's Commissioner of Correction, provides, in pertinent part:

> The following matters are grievable: . . . (3) Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein. . . . (5) Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans With Disabilities Act.

As the District Court determined, and the plaintiff has not contested, the plaintiff never filed a grievance regarding his allegations about the defendants' conduct, although he could have. Rather, he waited 2 years and 50 weeks before filing a federal lawsuit in the first instance. Thus, for purposes of appeal, it must be assumed that if the exhaustion requirement applies to excessive force claims, an administrative remedy was "available" that the plaintiff did not exhaust.

November 22, 1999, the District Court, *Nevas, J.*, granted the petitioners' motion.

The respondent appealed to the United States Court of Appeals for the Second Circuit, which on August 24, 2000, vacated the District Court's judgment and remanded. The Court of Appeals rejected the petitioners' arguments and the District Court's holding, choosing to "distinguish between 'excessive force' and 'prison conditions' claims for purposes of exhaustion under § 1997e(a)" and, contrary to at least two other courts of appeals, "conclud[ing] that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983." *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000).[3/]

3/ The District Court had also rejected the respondent's argument that the PLRA's exhaustion requirement did not apply to his claim because his complaint asked solely for money damages and the administrative remedy provided did not provide such damages as a remedy. The respondent claimed that exhaustion would therefore be futile and should be excused. There is, presently a split in the circuits on whether exhaustion is required when the inmate's complaint requests money damages that the administrative remedy cannot afford. *Compare Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (same), petition for cert. filed, No. 99-1918 (May 30, 2000); Wyatt v. Leonard, 193 F.3d 876 (6th Cir. 1999) (same); and Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998) (same), with Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), cert. denied, 120 S. Ct. 787 (2000); Whitley v. Hunt, 158 F.3d 882 (5th Cir. 1998) (same); and Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (same).* In fact, this Court has recently granted certiorari (*No. 99-1964*) on this issue in *Booth v. Churner, 206 F.3d 289, 293-98 (3d Cir. 2000)*. However,

Continued on next page...

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision in this case creates a split in the circuit courts on an issue of great significance nationally and is plainly contrary to this Court's caselaw construing similar statutory language. A ruling from this Court will have an impact upon hundreds, perhaps thousands, of cases either presently pending or to be filed in the future in the federal courts.

I. THE COURT OF APPEALS CREATED A SPLIT AMONG THE CIRCUITS ON AN ISSUE OF GREAT IMPORT TO THE FEDERAL SYSTEM.

As the Court of Appeals' opinion accurately states, the issue in this case presented "an issue of first impression in [the Second] Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment." *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000). The Court of Appeals decision settled a split of authority among the district courts in the Second Circuit,[4/] but in doing so, the Court of Appeals

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although the respondent renewed his claim on this issue in his appeal to the Court of Appeals, that court did not reach the issue, holding instead that excessive force claims like the respondent's need not be exhausted.

4/ *Compare Cuoco v. United States Bureau of Prisons, No. 98*

Continued on next page...

created a split of authority with the other circuit courts of appeals that had addressed the issue. *See Booth v. Churner, 206 F.3d 289, 293-98 (3d Cir. 2000)* (excessive force claims are actions "brought with respect to prison conditions" under § 1997e(a)), *cert. granted on other grounds, No. 99-1964 (October 30, 2000); Freeman v. Francis, 196 F.3d 641, 643-44 (6th Cir. 1999). See also Wendell v. Asher, 162 F.3d 887, 890-91 (5th Cir. 1998) (implicit); Garrett v. Hawk, 127 F.3d 1263, 1264-66 (10th Cir. 1997) (same).*

Further, it is no exaggeration to state that this Court's ruling on this issue will impact upon hundreds, perhaps thousands, of cases in the federal courts. In fact, Congress passed the PLRA in recognition of the fact that nearly one-quarter of all civil cases commenced in the District Courts are commenced by inmates. *See* 141 Cong. Rec. S7498-01 (May 25, 1995) (statement of Sen. Kyl) (reporting that in 1994, prisoners brought more than

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*Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000) (requiring exhaustion); Castillo v. Buday, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000) (same); Beeson v. Fishkill Correctional Facility, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998) (same); and Tolliver v. Wilson, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); Giannattasio v. Artuz, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000) (same); Wright v. Dee, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999) (excusing exhaustion); Carter v. Kiernan, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999) (same); Baskerville v. Goord, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998) (same); Royster v. United States, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999) (same).*

one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed). Suits making claims of excessive force against prison officials are a substantial subset of this enormous number. It is fair to say that resolving the existing circuit split will have a dramatic impact on the federal courts and their efforts to manage these cases. Thus, this case plainly involves an important question of federal law not yet decided by this Court. This, in and of itself, warrants this Court's grant of the writ. Supreme Court Rule 10(a) & (c).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *McCARTHY v. BRONSON.*

Moreover, the Court of Appeals' resolution of the statutory construction question "conflicts with relevant decisions of this Court." Supreme Court Rule 10(a). *McCarthy v. Bronson*, 500 U.S. 136, 111 S.Ct. 1737 (1991), an excessive force case in which this Court construed very similar language in a statute that addressed the preservation of federal judicial resources, clearly compels a conclusion that inmates must exhaust administrative remedies before bringing an excessive force claim pursuant to 42 U.S.C. § 1983 and the Eighth Amendment. The Court of Appeals made no effort to deal with this precedent.

A brief overview of the exhaustion of remedies doctrine in the context of actions brought under 42 U.S.C. § 1983 is helpful.

A. Before 1996, Exhaustion Was Not Mandatory For Inmates Bringing § 1983 Actions.

In *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982), this Court held that 42 U.S.C. § 1983[5/] does not have a general exhaustion requirement. The Court noted, however, that in 42 U.S.C. § 1997e, as it provided then,[6/] Congress had "created a specific, limited exhaustion

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5/ 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

6/ Before 1996, 42 U.S.C. § 1997e(a) provided:

> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983)

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requirement for adult prisoners bringing actions pursuant to § 1983." *Id.* at 508. "With the understanding that exhaustion generally is not required [for § 1983 actions], Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures." *Id.* at 509.

As this Court noted in *McCarthy v. Madigan*, 503 U.S. 140, 150, 112 S.Ct. 1081 (1992), § 1997e(a) was not mandatory. Rather, a court's discretionary determination to direct an inmate to exhaust his administrative remedies hinged on its finding that the remedy was "plain, speedy, and effective," and that requiring its exhaustion would be "appropriate and in the interests of justice."

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> by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective.

B. Congress' Adoption Of The PLRA Broadened And Made Mandatory The Application Of The Inmate Exhaustion Requirement.

In 1996, Congress acted on its concern about the rising number of federal civil rights actions brought by inmates. 141 Cong. Rec. S14408-01 *S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994); 141 Cong. Rec. S7498-01 (May 25, 1995) (statement of Sen. Kyl) (reporting that in 1994, prisoners brought more than one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed); 141 Cong. Rec. S14, 626-27 (1995) (statement of Sen. Hatch)(reporting that 39,000 lawsuits were filed by inmates in federal courts in 1994, a number that excludes "habeas corpus petitions or other cases challenging the inmate's conviction or sentence"). Increasingly large amounts of federal judicial time and resources were being devoted to inmate actions, crowding federal dockets at every level. Many of these actions, Congress believed, were either frivolous, unmeritorious or could have been addressed and rectified at the agency level.

Against this landscape, Congress passed the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), § 803 of which replaced the previous version of § 1997e. Section 803 of the PLRA provides:

> No action shall be brought *with respect to prison conditions* under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. (emphasis supplied)

This provision resulted in three significant changes to the language of § 1997e. First, the exhaustion requirement is no longer restricted just to § 1983 actions, but now also applies to all cases "brought . . . under any other Federal law." Second, exhaustion is now mandatory, and not merely discretionary. See Historical and Statutory Notes, 42 U.S.C.A. § 1997e (West Supp. 1997). That is, Congress has removed from federal courts the discretion to decide whether exhaustion would be appropriate and in the interests of justice, and has relieved courts, and the Attorney General, of the burden of evaluating whether the "available" administrative remedy substantially complies with minimum acceptable standards.[7/] Third, the

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7/ The PLRA "amends the CRIPA [Civil Rights of Institutionalized Persons Act] by requiring that all available administrative remedies be exhausted prior to a civil action being initiated on behalf of an inmate. Under CRIPA, courts were given the discretion of allowing for the exhaustion of administrative remedies, but were not required to do so. Under [the PLRA], that discretion is eliminated." Bernard D. Reams, Jr. & William H. Manz, A Legislative History of

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administrative remedy required to be exhausted need no longer be "plain, speedy, and effective," but rather the inmate must exhaust "such administrative remedies as are available."

"Congress did not enact the PLRA in a vacuum. It held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 727-28 (11th Cir. 1998). Thus, Congress intended § 1997e(a) to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust *all* administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H1472-06, *H1480 (daily ed. Feb 9, 1995) (emphasis supplied). The legislation leaves no room for a court to assess the severity of the allegations, to determine whether facially they state a claim or otherwise appear to have merit or to parse the forms of relief demanded. Instead a court must look first at whether the prisoner plaintiff has exhausted available administrative remedies; if not, the court must dismiss the action.

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the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, Docs. No. 32 & 33 (1997), hearings Before the Subcommittee on the Judiciary, house of Representatives, January 19 & 19, 1995, Doc. 53, at 82.

C. Consistent With This Court's *McCarthy v. Bronson* Decision, Actions "With Respect To Prison Conditions" Include Excessive Force Claims.

The plaintiff argued and the Court of Appeals agreed that his excessive force claim, brought under the Eighth and Fourteenth Amendments, is not an action "with respect to prison conditions," and therefore the PLRA's exhaustion requirement does not apply to him. This ruling, however, conflicts directly with this Court's construction of very similar language in a very similar context to *include* excessive force claims, contrary to the Court of Appeals' conclusion in this case.

In *McCarthy v. Bronson*, 500 U.S. 136, 139-43, 111 S.Ct. 1737 (1991), the Court addressed the Magistrate's Act, which permits District Courts to refer certain types of cases, including inmate cases, to magistrate judges for trial, proposed findings of fact and recommendations for disposition in order to lessen the burden of inmate cases on District Courts. Specifically at issue was the phrase "prisoner petitions challenging conditions of confinement," a phrase very similar to "actions . . . with respect to prison conditions," found in 42 U.S.C. § 1997e. The Court in *McCarthy* construed the phrase to include both allegations regarding ongoing prison conditions and allegations regarding specific episodes of unconstitutional conduct by prison officials, including claims of excessive force. This Court concluded that the plaintiff inmate's excessive force claim fell within the meaning of "petitions challenging conditions of confinement," and that the petition in that case was therefore properly referred to a magistrate judge non-consensually.

In reaching this conclusion, this Court determined that the "text of the statute does not define the term 'conditions of confinement' or contain any language suggesting that prisoner petitions should be divided into subcategories." On the contrary, when the relevant section is read in its entirety, "it suggests that Congress intended to authorize the nonconsensual reference of *all* prison petitions to a magistrate." *Id.* (emphasis supplied). Specifically, the Court rejected a claim that the words "conditions of confinement" limited the statute's application so as to take excessive force claims out of its reach. "The broader reading we adopt [ ] comports with the policy behind the Act . . . . to assist federal judges in handling an ever-increasing caseload'". . . by allowing "referral of broader category of cases." *Id.* at 142-43, quoting S. Rep. No. 94-625, p. 2 (1976).

The Court in *McCarthy* also reasoned that its reading "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases. Petitioner's definition would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.* at 143.

This Court has often held that "Congress will be presumed to have legislated against the background of our traditional legal concepts"; *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864 (1978); and specifically Congress is presumed to be aware of the Supreme Court's interpretations of its statutes. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866 (1978). Thus, by passing a judicial resources preservation statute in 1996

against a legal landscape in which the Supreme Court in *McCarthy v. Bronson* had construed a similar phrase to include excessive force claims, the only reasonable construction of the phrase "prison conditions" includes allegations of excessive force. *See Diezcabeza v. Lynch*, 75 F.Supp.2d 250, 253 (S.D.N.Y. 1999) (claims of excessive force by correction officers "most assuredly" constitute the "effects of actions by government officials on the lives of persons confined in prison").

This conclusion is buttressed by the fact that the section of the PLRA immediately preceding the section that amended 42 U.S.C. § 1997e defines "prison conditions" in a way that would include excessive force. Specifically, 18 U.S.C. § 3636(g)(2), which addresses appropriate remedies regarding prison conditions and which was enacted at the same time and as part of the same legislation (the PLRA) that amended § 1997e, provides: "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or *the effects of actions by government officials on the lives of persons confined in prison* . . . ." (emphasis supplied).

"[L]anguage used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260, 113 S.Ct. 2063 (1993). *See also Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S.Ct. 647 (1996). There could hardly be a clearer case in which Congress should be presumed to have intended one term to have the same meaning in different parts of the same Act, particularly because the amendment that became 18 U.S.C. § 3626g(2) was § 802 of the PLRA, while the amendment to § 1997e was § 803 of the PLRA. Employing the definition from 18 U.S.C. § 3626g(2), as the District Court

properly did, the plaintiff's claims about the defendants' alleged use of force upon him concern "the effects of actions by government officers" upon his life, and thus fall squarely within the statute. *See Freeman v. Francis*, 196 F.3d 641, 643-45 (6th Cir. 1999).

The Court of Appeals, in looking at the definition from § 3626g(2), thought the language too "awkward" to "ordinarily" describe instances of excessive force. Specifically, it quoted the dissent from the Third Circuit case, which argued:

A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Nussle v. Willette, 224 F.3d 95, 103 (2d Cir. 2000), quoting *Booth v. Churner*, 206 F.3d 289, 302 (*Noonan, J., concurring and dissenting*). Of course, this observation could be made just as persuasively about a lawsuit against the prison barber for a bad haircut, which the legislative history describes as one of the paradigmatic claims that the PLRA sought to prevent. See 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham). "Would you report the [bad haircut] by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution." *Nussle v. Willette*, 224 F.3d 95, 103 (2d Cir. 2000), quoting *Booth v. Churner*, 206 F.3d 289, 302 (*Noonan, J., concurring and dissenting*).

What the Court of Appeals in this case and the dissenting judge in *Booth* describe is simply a reflection of

the imprecision in language that often accompanies a legislature's attempt to sweep broadly. In *McCarthy*, this Court faced the very same problem with very similar language, and even went so far as to state: "We do not quarrel with petitioner's claim that the most natural reading of the phrase 'challenging conditions of confinement,' when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737 (1991).[8/]

Moreover, reading the term "prison conditions" to include claims like the plaintiff's is consistent with the purpose and legislative history of the PLRA: to reduce both frivolous prisoner lawsuits and federal court intervention into the management of prison systems. As the Sixth Circuit has stated:

A broad exhaustion requirement that includes excessive force claims effectuates this purpose and maximizes the benefits of requiring prisoners to use prison grievance procedures before coming to federal court.

8/ Similarly, this Court in *McCarthy* rejected the argument, also advanced here by the respondent, that there is a distinction in Eighth Amendment jurisprudence between claims based on excessive force and those based on prison conditions. While this distinction might hold true in some contexts, Congress did not manifest in the PLRA an intent to draw this distinction between § 1983 actions. As the District Court below stated, "there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation." (A-29)

Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.

Freeman v. Francis, 196 F.3d 641, 643-45 (6th Cir. 1999). Requiring exhaustion in excessive force cases, as much as in other cases (if not more), also advances the policy of permitting the prison administration, and ultimately the federal court, to create a timely and accurate "record of the conduct and actions complained of by those close to the scene with intimate knowledge of the facts, people and circumstances [, which] can be of invaluable assistance in arriving at just and expeditious results, limiting the need for prolonged, imperfect and often difficult discovery in federal court." *Cruz v. Jordan*, 1999 U.S.Dist. LEXIS 11487 *28-29 (S.D.N.Y. 1999). *See also McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081 (1992) (noting exhaustion "may produce a useful record for subsequent judicial consideration").

In fact, to accept the view of the respondent, and the Court of Appeals below, would require this Court to conclude that in passing the PLRA, Congress intended to exclude from its reach one out of the myriad types of § 1983 claims that prisoners might file. Not only is there nothing in the statute's plain language to support this argument, there is nothing in the legislative history of the Act that could in any way lead the Court to this conclusion. To the contrary, the legislative record indicates that Congress expected the PLRA exhaustion requirement to apply to prison assault cases. *See* 141 Cong. Rec. S14,628 (1995) (statement of Sen. Biden) (opposing the PLRA and discussing two prison assault cases as examples of suits that would be hindered by the passage of the PLRA); 141 Cong. Rec. S7498-01, *S7524 (Statement of Sen. Dole) (referring to "cruel and unusual punishment" complaints).

The Court of Appeals below ignored these legislative statements completely, choosing to rely instead upon the statements about lawsuits over the types of peanut butter provided in prison and the failure to be invited to a pizza party. These statements are admittedly more prevalent in the legislative history, but only because they so vividly illustrate the types of lawsuits prison officials confront. The statements by no means provide the basis for concluding, as the Court of Appeals did here, that Congress intended to distinguish between "claims that may be frivolous as to subject matter" versus claims that if proven factually would not be frivolous. For example, no one can credibly contest that an inmate complaining of restrictions on religious freedom that would constitute a grave First Amendment violation would nonetheless be subject to the exhaustion requirement.[9/] There simply is no principled way based on the statutory language and legislative history to carve out excessive force claims from the universal claims that prisoners might bring, some of which may raise previous constitutional issues.

9/ It is important to note that the District Court's and the defendants' position would not prevent the plaintiff and others with such constitutional grievances from ultimately filing federal actions to obtain damages for them. Rather, Congress has simply added a preliminary exhaustion requirement prior to the commencement of such a suit, and done so because it has determined, after holding hearings and gathering information, that inmate cases generally have less merit and clog the federal courts more than other classes of cases. Said another way, no one is denying, as the Court of Appeals seems to believe, that there is a "difference between punching a prisoner in the face and serving him unappetizing food." *Hudson v. McMillan*, 503 U.S. 1, 11, 112 S.Ct. 995 (1991) . The point simply is that Congress intended an exhaustion requirement for both types of claims.

CONCLUSION

Given this Court's construction of similar language in *McCarthy*, the context of the legislation, the breadth of its intended application and the legislative history surrounding its enactment, the most reasonable and accurate construction of the language of § 1997e(a) is that Congress intended the exhaustion requirement to apply to all types of prisoner claims. There is no reason to believe that Congress intended to exempt the plaintiff's particular type of case from the general exhaustion requirement.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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In The
Supreme Court Of The United States
October Term, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE
Petitioners,

v.

RONALD NUSSLE
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 3, 2000 Decided: August 24, 2000)

Docket No. 99-0387

RONALD NUSSLE,

Plaintiff-Appellant,

-v.-

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,

Defendants-Appellees.

Before: CALABRESI, PARKER, and STRAUB, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) granting the defendant's motion to dismiss the plaintiff's § 1983 complaint for failure to exhaust administrative remedies. The District Court held that the Prison Litigation Reform Act of 1995 ("PLRA") required the plaintiff to exhaust administrative remedies before bringing his § 1983 claim to court. We reverse the District Court's judgment, holding that the PLRA exhaustion requirement does not encompass claims for assault or excessive use of physical force under the Eighth Amendment.

Vacated and remanded.

NORMAN A. PATTIS, Williams and Pattis, LLC, New Haven, CT, *for Plaintiff-Appellant.*

GREGORY T. D'AURIA, Assistant Attorney General, State of Connecticut (Richard Blumenthal, Attorney General, and Robert B. Fiske, III, Assistant Attorney General, on the brief), for Defendants-Appellees.

STRAUB, *Circuit Judge*:

Appellant Ronald Nussle appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*), dismissing his complaint for failure to exhaust administrative remedies. Nussle's appeal presents an issue of first impression in this Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment. Because we conclude that § 1997e(a) does not apply to allegations of particular instances of excessive force or assault by prison employees, we vacate the District

Court's judgment and remand for reinstatement of Nussle's complaint.

BACKGROUND

This action arises from Nussle's claim that he was wrongfully assaulted by corrections officers acting under color of law at the Cheshire Correctional Institute ("CCI") in Cheshire, Connecticut. Nussle has been an inmate at CCI, under custody of the Connecticut Department of Corrections ("DOC"), since May 1996. He alleges that from the time of his arrival at CCI, he was the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers on account of his perceived friendship with the Governor of the State of Connecticut. Nussle complains of injuries arising from one particular violent incident during that period. According to Nussle, on or about June 15, 1996, defendants Willette [1] and Porter entered his cell, instructed him to leave the cell, and proceeded to beat him without apparent provocation or justification of any sort. The officers allegedly "placed [Nussle] against a wall and struck him with their hands, kneed him in the back, [and] pulled his hair. The plaintiff was beaten so badly he lost control of his bowels." Nussle claims that these actions were motivated by a sadistic intent to cause physical pain, and that the officers threatened to kill him if he reported the beating. As a result of the incident, Nussle asserts that he suffered bruises, lacerations, physical pain (including ongoing numbness in his right leg), and emotional distress.

On June 10, 1999, Nussle commenced this action against corrections officers Willette and Porter in their individual capacities. His claim under 42 U.S.C. § 1983 alleges that the officers violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and his Fourteenth Amendment right to substantive due process. [2] Nussle also asserted pendent state law claims for assault and battery. In order to remedy his injuries, Nussle's complaint sought compensatory and punitive damages as well as attorney's fees and the costs of bringing this action.

The defendants moved to dismiss Nussle's complaint on the ground that he had failed to exhaust administrative remedies. The District Court agreed and granted the defendants' motion, holding that the exhaustion requirement of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) ("PLRA") (codified at 42 U.S.C. § 1997e(a) (Supp. 2000)), required Nussle first to exhaust DOC's administrative remedies before taking his § 1983 claim to court. This timely appeal followed.

DISCUSSION

We review a grant of a motion to dismiss for lack of exhaustion *de novo*, taking as true all allegations in the complaint, and drawing all reasonable inferences therefrom in favor of the nonmoving party. *See In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). We must "vacate the dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 110 (2d Cir. 1998) (internal quotation marks omitted).

I. Enactment of the PLRA Exhaustion Requirement

As a general matter, exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982); *see also Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998). Statutory purpose and legislative intent support this presumptive rule of non-exhaustion. The "very purpose" of § 1983, the precursor of which first was enacted during Reconstruction as part of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225,

242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *see Patsy*, 457 U.S. at 503.

Nevertheless, exhaustion of state remedies may be required in those limited circumstances in which "Congress has carved out a specific exception to the general rule that exhaustion is not required." *Doe*, 148 F.3d at 78. The inmate exhaustion provision at issue in this case, 42 U.S.C. § 1997e(a), is an exception of this sort. This provision first was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997, 1997a-1997j (1994 & Supp. 2000)), and was intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 actions. *Patsy*, 457 U.S. at 508 (1982) (refusing to require exhaustion for § 1983 claims not covered by the CRIPA exhaustion provision); *see also McCarthy v. Madigan*, 503 U.S. 140, 149 (1992) (declining to extend § 1997e(a)'s exhaustion provision to *Bivens* actions). The pre-PLRA version of § 1997e(a) provided a discretionary mechanism by which courts could (but were not obligated to) require prisoners to exhaust state administrative remedies before asserting claims under § 1983. 3

Section 803(d) of the PLRA added teeth to the § 1997e(a) exhaustion provision, affirmatively *requiring* prisoners to exhaust administrative remedies, whether federal or state, before bringing any federal claims "with respect to prison conditions." 4 The PLRA strengthened the § 1997e(a) exhaustion provision in three relevant respects. First, by its own terms the pre-PLRA exhaustion provision applied only to § 1983 claims, not to actions brought under other federal laws. *See, e.g.*, *McCarthy*, 503 U.S. at 150. The amended provision, by contrast, applies to any federal claim brought "with respect to prison conditions." 42 U.S.C. § 1997e(a). Second, the pre-PLRA provision was not mandatory upon courts. Rather, it simply *authorized* courts to invoke exhaustion, at their discretion, if requiring exhaustion "would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1994) (amended 1996). In so doing, a court was permitted only to "continue" the action for up to 180 days, not to dismiss the action outright. *See*

McCarthy, 503 U.S. at 150; *Patsy*, 457 U.S. at 510-11. The PLRA, however, requires exhaustion of available administrative remedies before inmate-plaintiffs may bring their federal claims to court at all. Third, exhaustion under the pre-PLRA version of § 1997e only could be required if two conditions were met: (1) if the available administrative procedures were "plain, speedy, and effective"; and (2) if the Attorney General certified, or the court itself determined, that the prison's grievance provisions substantially complied with minimum acceptable standards set forth by the Attorney General or were "otherwise fair and effective." *See Patsy*, 457 U.S. at 510-11. The PLRA, on the other hand, does not make "effectiveness" of administrative remedies a precondition to the exhaustion requirement.

At the same time that it expanded the scope of CRIPA's exhaustion provision, the PLRA also explicitly limited its applicability only to federal actions that are brought "with respect to prison conditions"-a qualification on the scope of the exhaustion provision not found in the pre-PLRA version of § 1997e(a). Therefore, analysis of whether the amended version of § 1997e(a) applies to excessive force or assault claims must account for the manner in which the PLRA broadened the scope of this provision as well as the manner in which it simultaneously limited that scope. Both aspects of this amendment, in other words, must be presumed to have "real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), so as not to render statutory language superfluous. *See Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *3 (S.D.N.Y. Nov. 5, 1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

We interpret the amended version of § 1997e(a) against the background principles that govern exhaustion of administrative remedies generally, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998), and

in light of the interpretive principle that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the [general rule]." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Patsy*, 457 U.S. at 508 (exhaustion provision in § 1997e(a) is intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 cases); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (narrowly interpreting statutory exception in Copyright Act).

I. Applicability of § 1997e to Excessive Force or Assault Claims

Whether or not assault or excessive force claims are subject to the amended version of the § 1997e(a) exhaustion requirement turns entirely on whether such claims fall within the category of actions "brought with respect to prison conditions" covered by that provision. If particular incidents of assault or the use of excessive force do not constitute "prison conditions" within the meaning of the statutory text, then Nussle's § 1983 claim should not be subject to the exhaustion requirement. Conversely, if claims for particular instances of assault or excessive force *are* properly considered claims "brought with respect to prison conditions," then Nussle must fulfill § 1997e(a)'s requirement that he exhaust "such administrative remedies as are available" [5] before taking his federal claims to court. 42 U.S.C. § 1997e(a). The issue is one of first impression in this Circuit. *See Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (declining to resolve the "complex legal issue[]" of whether § 1997e(a)'s exhaustion requirement encompasses particular claims for excessive force).

Courts have divided over whether excessive force and assault claims are encompassed within this provision. *See id.* (noting split in authority). A number of courts that have analyzed the issue, including the Third and Sixth Circuits, have concluded that § 1997e(a) does encompass such claims. [6] *See Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (excessive force claims are actions "brought with

respect to prison conditions" under § 1997e(a)), *petition for cert. filed*, No. 99-1964 (June 5, 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999); *Cuoco v. United States Bureau of Prisons*, No. 98 Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998). However, a number of courts have held to the contrary. *See Tolliver v. Wilson*, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); *Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000); *Wright v. Dee*, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999); *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999); *Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998); *Royster v. United States*, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999); *see also Peddle v. Sawyer*, 64 F. Supp. 2d 12, 15-16 (D. Conn. 1999) ("prison conditions" does not encompass sexual assault). In light of the text, structure, and legislative history of the PLRA, we agree with those courts that have held that § 1997e(a) does not encompass particular instances of excessive force or assault.

A. *Statutory Text of § 1997e(a)*

In considering the proper scope of §1997e(a), we begin by examining the text of the statute itself, since the language of a statutory provision, if clear and unambiguous on its face, is presumed to bear its plain meaning unless the text suggests an absurd result. *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("In the usual case, if the words of a statute are unambiguous, judicial inquiry should end, and the law is interpreted according to the plain meaning of its words."). When considering plain meaning, we nevertheless must also keep in mind context and the structure of the statute as a whole. *See, e.g., Miller v. French*, 120 S. Ct. 2246, 2248-49 (2000); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (internal quotation marks and citation omitted)); *K Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (assessment of plain meaning must also look to "language and design of the statute as a whole").

The use in § 1997e(a) of the term "prison conditions," however, is scarcely free of ambiguity. Section 1997e(a) itself provides no definition of what constitutes a claim "brought with respect to prison conditions"-and neither does § 1997e(h), the definitional provision of § 1997e, or § 1997, which also defines terms used in § 1997e. The plain meaning of "prison conditions" in § 1997e(a) does not obviously encompass particular instances of excessive force or assault, as the defendants argue here-indeed, it actually suggests the opposite. In the context of this statute, the term "conditions," used in its plural form, denotes "attendant circumstances" or an "existing state of affairs"-as exemplified by such ordinary phrases as "living conditions," "playing conditions," and "adverse weather conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961); *see also Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting). In light of this definition of "conditions," the use of the term "prison conditions" in § 1997e(a) would appear to refer to "circumstances affecting everyone in the area affected by them," rather than "single or momentary matter[s]," such as beatings or assaults, that are directed at particular individuals. 7 *Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting); *see also Carter*, 1999 WL 14014, at *3 ("The ordinary, contemporary, common meaning of the phrase 'prison conditions' refers to such things as medical treatment, food, clothing, and the nature and circumstances of the housing available in prison.").

B. *Relationship between 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g)(2)*

While § 1997e(a) does not expressly define the term "prison conditions," similar language is used and explicitly defined in a different section of the PLRA, 18 U.S.C. § 3626(g)(2). 8 This definition, by its own terms, only applies to "this section"-*i.e.*, 18 U.S.C. § 3626. Nevertheless, the defendants urge that § 1997e(a) should be read *in pari*

materia with 18 U.S.C. § 3626, based on the interpretive canon that language "used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) ("Construing identical language in a single statute *in pari materia* is both traditional and logical."). Other courts have read the "prison conditions" language of § 1997e(a) *in pari materia* with the definition provided in 18 U.S.C. § 3626(g)(2). *See, e.g. Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F. Supp. 2d at 888; *Giannattasio*, 2000 WL 335242, at *11-*12. *But see Carter*, 1999 WL 14014, at *3-*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of "prison conditions" under § 1997e(a)). The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself-indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance. *Compare, e.g., Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court) (excessive force claims are encompassed within the § 3626(g)(2) definition); *and Beeson*, 28 F. Supp. 2d at 888-89 (same), *with Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (excessive force claims do not fall within the definition in 18 U.S.C. § 3626(g)(2) and are therefore outside the scope of § 1997e(a)); *Baskerville*, 1998 WL 778396, at *4-*5 (same).

Section 3626(g)(2) encompasses two categories of civil actions: (1) those brought with respect to "conditions of confinement," and (2) those brought with respect to "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (Supp. 2000). Section 3626(g)(2)'s reference to "conditions of confinement" is "no more apt" to include particular instances of assault or excessive force than the reference to "prison conditions" in § 1997e(a) itself. *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting). To characterize particular instances of assault or the use of excessive force as "conditions of confinement" clearly

departs from normal, everyday use of the phrase, as the Third Circuit concedes and other courts apparently do not urge. *See id.* at 294, 296 n.5 (opinion of the court) (excessive force claims "do not naturally fall into" category of actions "with respect to conditions of confinement"); *id.* at 301 (Noonan, J., concurring and dissenting) (statutory phrase "'conditions of confinement' does not encompass specific batteries").

Instead, those courts requiring exhaustion have, without exception, placed excessive force and assault claims within the second category set forth in § 3626(g)(2), "effects of actions by government officials on the lives of persons confined in prison." *See, e.g., id.* at 294-95 (opinion of the court); *Beeson*, 28 F. Supp. 2d at 888-89 (quoting and following *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998)). In so doing, however, these courts have simply assumed it to be self-evident that such claims fall within the scope of § 3626(g)(2)'s second category-with a typical example being the Third Circuit's broad reading of that phrase to include almost all actions by government officials that "affect the lives of prisoners similarly . . . [by making] their lives worse." *Booth*, 206 F.3d at 295; *see also Beeson*, 28 F. Supp. 2d at 888-89 (concluding, without analysis, that excessive force claims are included within the ambit of § 3626(g)(2)).

We disagree with the notion that particular instances of assault or excessive force self-evidently constitute "effects of actions by government officials on the lives of persons confined in prison" under the second category of § 3626(g)(2), since such awkward language would not, ordinarily, be used to describe such incidents. In his dissent from the Third Circuit's decision in *Booth v. Churner*, Judge Noonan, sitting by designation, vividly argues this point:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken

> or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Booth, 206 F.3d at 302 (Noonan, J., concurring and dissenting); *see Giannattasio*, 2000 WL 335242, at *12 (holding that the use of excessive force does not constitute a "prison condition" in the ordinary sense of the term). The use of "roundabout phraseology," of course, does not necessarily end the inquiry, for Congress certainly "has a right to define one thing to mean something different from what it normally means." *Benjamin v. Jacobson*, 172 F.3d 144, 173 (2d Cir.) (en banc) (Calabresi, J., concurring), *cert. denied*, 120 S. Ct. 72 (1999). Still, the "elephantine way" in which Congress drafted § 3626(g)(2), *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), does signal the need for closer inquiry-for it is hardly certain that the text of the statute includes claims of excessive force or assault, at least not without further explanation. 9 *Cf. Benjamin*, 172 F.3d at 192 n.35 (Calabresi, J., concurring) ("[I]f [a legislature] seems to say that a banana *is* an apple, we should not hesitate to try to figure out what it really meant to say.").

C. *Structure, Purpose, and Legislative History of the PLRA*

Since the text of both 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g) are ambiguous, we turn to the structure and purpose of the statute as a whole, the legislative history of the PLRA, and the broader legal context for interpretive guidance concerning the meaning of "prison conditions" and the relationship between § 1997e(a) and § 3626(g)(2). *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (in addition to statutory language, courts must also look to the "design of the statute as a whole and to its object and policy" to determine the statute's meaning).

Sections 3626(g)(2) and 1997e(a), enacted by §§ 802 and 803 of the PLRA, respectively, advance distinct statutory purposes. While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get

to court, 18 U.S.C. § 3626-codified in an entirely different title of the U.S. Code-is concerned with the different purpose of preventing "courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Baskerville*, 1998 WL 778396, at *4 (internal quotation marks, citations, and footnote omitted); *see also Benjamin*, 172 F.3d at 182 (Calabresi, J., concurring) (noting that by enacting § 3626, "Congress meant to get the federal courts out of the business of running jails").

In this light, the term "government officials" in § 3626(g)(2) is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive physical force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority. *See Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *12 (concluding that the second category in § 3626(g)(2) refers to "acts of supervisory officials, such as the imposition of general rules and policies, that influence how a prison is run . . . [and not] day-to-day interactions between prisoners and corrections officers"); *Baskerville*, 1998 WL 778396, at *4 (interpreting § 3626(g)(2) in light of that section's purpose to conclude that the definition "contemplates actions by prison officials that have broad effects on prison administration"). A similar use of the term "official" in a different part of the same section supports this conclusion. Section 3626(a)(3)(F), concerned with the prerequisites for the issuance of prisoner release orders, confers standing to oppose such release orders upon "[a]ny State or local official" whose "jurisdiction or function includes" the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. *See, e.g., Ruiz v. Estelle*, 161 F.3d 814, 819-21 (5th Cir. 1998) (discussing and interpreting § 3626(a)(3)(F)), *cert. denied*, 526 U.S. 1158 (1999). As in § 3626(g)(2), this usage of the word "official" quite clearly

refers to those officials with administrative or policymaking responsibility.

An examination of cases in which § 3626 directly has been applied also reinforces this conclusion: the types of "government officials" who were defendants or parties to consent decrees in the institutional reform actions brought prior to the enactment of the PLRA routinely were senior policymaking or administrative officials. *See, e.g.*, *Miller v. French*, 120 S. Ct. 2246, 2250-51 (2000) (inmate class action initially brought against Indiana prison officials, including superintendent of correctional facility); *Ruiz v. Johnson*, 178 F.3d 385, 387 (5th Cir. 1999) (inmate class action initially brought against Texas prison officials, including director of Texas Department of Criminal Justice and members of Texas Board of Criminal Justice), *abrogated by French*, 120 S.Ct. 2246; *Benjamin*, 172 F.3d at 149-50 (seven class actions by pretrial detainees initially brought against New York City prison officials, including commissioner of corrections), *cert. denied*, 120 S.Ct. 72 (1999); *Hadix v. Johnson*, 133 F.3d 940, 941 (6th Cir.) (inmate class action initially brought against "various state prison officials" in Michigan), *cert. denied*, 524 U.S. 952 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 652 (1st Cir. 1997) (class action by pretrial detainees initially brought against Massachusetts prison officials, including Suffolk County sheriff and Massachusetts corrections commissioner), *cert. denied*, 524 U.S. 951 (1998); *Gavin v. Branstad*, 122 F.3d 1081, 1083 (8th Cir. 1997) (inmate class action initially brought against "a number of Iowa state officials"), *cert. denied*, 524 U.S. 955 (1998). Moreover, many of the institutional reform actions to which 18 U.S.C. § 3626 is addressed initially were brought as class actions. *See, e.g.*, *Benjamin*, 172 F.3d at 149-50. By their nature, such aggregated claims target the actions of senior officials, and, indeed, the "prospective relief" that subsequently resulted typically took the form of consent decrees between plaintiffs and elected or appointed state officials or injunctions mandating action at the policymaking levels of the state or local government, not lower level government employees. *See, e.g.*, *id.* (discussing consent decrees that were entered in actions

brought by classes of pretrial detainees in mid-1970s). *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-22 (1997) (discussing the kinds of litigation in the 1970s and 1980s that catalyzed the political and judicial responses that ultimately resulted in the enactment of the PLRA).

We therefore decline the defendants' invitation to blindly import the 18 U.S.C. § 3626(g)(2) definition of "civil actions brought with respect to prison conditions" into 42 U.S.C. § 1997e(a) without regard to context and the distinct statutory purposes that these two provisions advance. *See Carter*, 1999 WL 14014, at *3-4; *Baskerville*, 1998 WL 778396, at *4. *Cf. French*, 120 S.Ct. at 2259 (automatic stay provision of § 3626(e)(2) "must be read not in isolation, but in the context of § 3626 as a whole"). And even to the extent that we may rely upon § 3626(g)(2), it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as "government officials," since such a reading of the term "officials" would include just about any government employee without regard to level of responsibility or authority. *See Giannattasio*, 2000 WL 335242, at *12.

An examination of the legislative history of the PLRA suggests the same result. The PLRA's sponsors broadly categorized the bill's provisions as being divided into two major sets of provisions: (1) those aimed at deterring frivolous suits by inmates by raising the cost to prisoners of engaging in "inmate litigation fun-and-games" (garnishment procedure in amendment to *in forma pauperis* provisions; exhaustion provisions; revocation of good-time credits for frivolous suits; prohibition against suing for mental or emotional injury absent showing of physical injury); and (2) those that establish "some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions . . . [in order to] restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison

systems." 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole, Majority Leader of the Senate). 10 With respect to the first category, floor statements overwhelmingly suggest that the concern over "frivolous" suits in this context refers to subject matter, rather than to the factual merits of a claim that, if proven, would be meritorious. *See, e.g.*, 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch, Chair of Senate Judiciary Committee) (PLRA is designed to "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying *actual violations of prisoners' rights*") (emphasis added); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (providing examples of "frivolous" cases to be prevented as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety").

As revealed by this examination of statutory purpose and context, it is clear that particular instances of assault or excessive force were never meant to be included within the ambit of § 3626(g)(2) at all. In context, it makes little sense to apply the definition in § 3626(g)(2) to particular cases of assault or excessive force that do not contemplate ongoing judicial supervision or some other form of "prospective relief" affecting large numbers of inmates-let alone individual claims that complain of past, wholly completed conduct-since § 3626 does not even cover claims for compensatory money damages. *See* 18 U.S.C. § 3626(g)(7) ("the term 'prospective relief' means all relief other than compensatory monetary damages"). In addition to the rather "inept" use of language that would result from the defendants' interpretation, *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), including particular claims of this sort would do nothing to advance the purpose of the section.

Consideration of the background Eighth Amendment principles against which Congress enacted the PLRA also supports this conclusion. Pre-PLRA Supreme Court

decisions disaggregate the broad category of Eighth Amendment claims so as to distinguish between "excessive force" claims, on the one hand, and "conditions of confinement" claims, on the other. In *Hudson v. McMillian*, for example, the Supreme Court reiterated that because "contemporary standards of decency always are violated" by the malicious and sadistic use of force against prisoners, a less rigorous showing of injury was required for such claims than for conditions of confinement claims, for which "only those deprivations denying the minimal civilized measure of life's necessities" give rise to claims under the Eighth Amendment. 503 U.S. 1, 9 (1992) (internal quotation marks omitted); *see also id.* at 11 ("To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." (internal quotation marks omitted)); *see also Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (distinguishing "excessive force" and "conditions of confinement" claims as being subject to different *mens rea* requirements).

The principles underlying this distinction are equally applicable here. While § 1997e(a) filters through administrative grievance procedures "prison conditions" claims that may be frivolous as to subject matter, the text, structure, purpose, and legislative history of the PLRA provide ample justification for not treating excessive force or assault claims in the same manner. Especially in light of our obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in § 1983 cases, *see City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982), we distinguish between "excessive force" and "prison conditions" claims for purposes of exhaustion under § 1997e(a) and conclude that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983.

CONCLUSION

We hold that Nussle was not required to exhaust DOC's administrative grievance procedures before bringing this action for excessive force and assault. We therefore REVERSE the District Court's judgment and REMAND for reinstatement of Nussle's complaint.

---- Begin EndNotes ----

1 The Attorney General claims that there is not, in fact, any correction officer at CCI named "Willette." Nussle has not, however, withdrawn the action as to this officer.

2 The District Court dismissed Nussle's substantive due process claim as redundant, and Nussle does not advance this claim on appeal.

3 Before the PLRA went into effect, the exhaustion provision of § 1997e(a) read as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e(a) (1994) (amended 1996).

4 The amended version of § 1997e(a) reads as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. 2000) (as amended by PLRA § 803).

5 Since we conclude that Nussle is not obligated to exhaust administrative remedies based on the subject matter of his complaint, we need not address his additional contention that since the DOC administrative grievance procedures make no provision for the award of monetary relief, he is not subject to the exhaustion requirement because there is no administrative remedy "available" to him. We note, however, that other circuits have divided over this issue. *Compare Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (same), *petition for cert. filed*, No. 99-1918 (May 30, 2000); *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999) (same); *and Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998) (same), *with Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), *cert. denied*, 120 S. Ct. 787 (2000); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998) (same); *and Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) (same). *Cf. Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any 'remedy.'").

6 In addition, the Fifth and Tenth Circuits have required exhaustion in cases involving excessive force, but without explicitly considering whether such claims properly fall within the § 1997e(a) requirement. *See Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997).

7 As Judge Noonan observes, the only other variant to this definition of "conditions" that is relevant to the term's usage in this statute-"something needing remedy" (as used in the sentence, "Trains were late to New York because of conditions in New Jersey")-suggests the same connotation. WEBSTER'S THIRD INTERNATIONAL DICTIONARY, *supra*, at 473; *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting).

8 Title 18, section 3626(g)(2) of the United States Code provides:

> (g) Definitions.-As used in this section-
>
> . . .
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (Supp. 1999) (as amended by PLRA § 802).

9 It should be noted that § 3626(g)(2) explicitly excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its reach. 18 U.S.C. § 3626(g)(2). Superficially, this exclusion might suggest that Congress meant to divide the universe of civil actions brought by prisoners into two broad categories-(1) habeas corpus actions challenging the very fact or duration of imprisonment, which are excluded from § 3626; and (2) actions that do not challenge imprisonment as such, but some particular aspect of imprisonment-and meant to include this second category in its entirety. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 139-40 (1991) (relying on similar categorization of prisoners' actions to interpret 28 U.S.C. § 636(b)(1)(B), which authorizes nonconsensual referral of petitions brought by

prisoners to magistrate judges); *Booth*, 206 F.3d at 295 (discussing *McCarthy*).

However, the fact that habeas actions have been excluded from § 3626(g)(2) does not mean that all other claims that might be brought by prisoners are necessarily included by negative implication. Since it is hardly obvious that excessive force and assault claims fall within either of § 3626(g)(2)'s two categories, it remains necessary for us to interpret the breadth of these categories to determine whether such claims fall within the definition of "actions brought with respect to prison conditions"-and indeed, to determine whether § 3626(g)(2) should be relied upon to interpret § 1997e(a) at all.

10 Senator Dole was an original co-sponsor of the PLRA. *See* 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE :

v. : 3:99cv1091(AHN)

C.O. WILLETTE, ET AL :

RULING ON MOTION TO DISMISS

The plaintiff, Ronald Nussle ("Nussle"), brings this action against the defendants, correctional officer Willette ("Willette") and correctional officer Porter ("Porter"), alleging violations of 42 U.S.C. § 1983,[1/] as well as a state law claim for assault and battery.

1/ Specifically, Nussle alleges violation of his substantive due process rights under the Fourteenth Amendment. He also alleges the use of excessive force by the defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Nussle's substantive due process claim is based on the same facts as his excessive force claim. However, in *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986), the United States Supreme Court recognized that, while the same facts may state a claim under the Eighth Amendment for cruel and unusual punishment as well as a substantive due process claim under the Fourteeneth Amendment, after conviction, "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection...in cases...where the deliberate use of force is challenged as excessive and unjustified." *Whitley*, 475 U.S. at 327; *see also Meriwether v.*

Now pending before the Court is Porter's motion to dismiss Nussle's entire complaint. For the reasons that follow, the motion [doc. #8] is GRANTED.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." *United Coughlin*, 879 F.2d 1037, 1047 (2d Cir. 1989).

Thus, "any protection [the Fourteenth Amendment] affords convicted prisoners against excessive force is at best redundant of that profided by the Eighth Amendment." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1870-71 n. 10 (1989) (explaining that actions which are protected under specific constitutional provisions should be analyzed under those provisions and not under "the more generalized [provisions] of substantive due process"); *see also Whitley*, 475 U.S. at 327 (noting that in the context of excessive force claims, the Due Process Clause provides prisoners no greater protection than the Eighth Amendment). Accordingly, in this case, Nussle's claim will be analyzed solely under the Eighth Amendment, and his claim under the Fourteenth Amendment is dismissed.

States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 236). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

FACTS

The plaintiff, an inmate in the custody of the State of Connecticut Department of Correction at Cheshire Correctional Institute ("Cheshire"), both now and at all times relevant to this lawsuit, alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation. (See Pl.'s Compl. ¶¶ 7, 9.) Specifically, Nussle alleges that on June 15, 1996, the defendants, together with other unknown correctional officers, entered his cell, placed him against the wall and, without provocation or justification, proceeded to violently beat him. (*See id.* ¶¶ 10, 11.) Nussle further alleges that the defendants told him he would be killed if he reported the incident. (*See id.* ¶ 12.) Nussle contends that as a result of the alleged assault he suffers from physical and emotional distress. (*See id.* ¶ 13.) He is seeking compensatory and punitive damages as well as attorney's fees and costs of this action.

DISCUSSION

Porter maintains that 42 U.S.C. § 1997e(a) of the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), precludes an inmate from bringing a § 1983 lawsuit in federal court if the inmate has failed to exhaust administrative remedies within the Department of Corrections ("DOC"). Porter asserts that this action is governed by the PLRA because Nussle's claim of excessive force involves prison conditions. He contends that Nussle's failure to file a formal complaint under the DOC's inmate grievance procedures[2/] or to try to

2/ Specifically, Porter maintains that Nussle was required to follow the procedures set forth in the DOC's Administrative Directive 9.6. Subsection 6 of Administrative Directive 9.6 covers matters that are grievable by inmates. It provides that "[a]ny other matter relating to . . . conditions of care or supervision" is grievable through the DOC's administrative procedures (See Administrative Directive 9.6, subsection 9.6.A.5.).

informally resolve it under the DOC procedures[3/] renders his complaint premature and that dismissal is thus required.

In response, Nussle asserts that the exhaustion requirement of the PLRA does not apply in this case because he is not alleging that the conditions of his confinement are unlawful, but is only alleging a violation of his Eighth and Fourteenth Amendment rights. He further contends that exhaustion in this case would be futile because the DOC grievance procedures do not address excessive force claims made by prisoners against officers and because he is seeking compensatory and punitive damages, which cannot be recovered in a DOC grievance hearing.

I. PLRA

42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner...until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The intended purpose of the PLRA was to limit frivolous prisoner lawsuits, which had comprised more than twenty-five percent of all cases filed in the United States District Courts. See 141 Cong. Rec. s7498-01, *7526 (daily ed. May 25, 1995) (statement of Senator Kyl).

3/ Subsection 9 of Administrative Directive 9.6 states that "[a]n inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with the staff able to resolve the matter...."

Although the PLRA requires exhaustion, there is no consensus among the circuits as to the circumstances when exhaustion is required and when it is not required. In fact, the district courts in the Second Circuit are not in agreement on this issue. Specifically, there is a difference of opinion on the two issues that are implicated here: (1) whether the exhaustion requirement applies where the relief requested, i.e., money damages, is not available through the administrative process; and (2) whether cases alleging the use of excessive force are actions "with respect to prison conditions" as that phrase is used in 42 U.S.C. § 1997e(a).

A. Administrative Remedies

Courts are not in agreement as to whether § 1997e(a) applies where prisoners seek money damages and such relief cannot be obtained in the administrative process. *Compare Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (discussing the split among circuits on the issue and holding that the inmate was not required to exhaust administrative remedies where remedy sought was not available in prison's administrative system); and *Garret v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (holding that § 1997e(a) applies only to the extent that the administrative process provides the relief requested); *with Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999) (holding that neither assertion that exhaustion would be futile nor alleged unavailability of administrative remedy negated exhaustion requirement).

The cases which have held that exhaustion is not required reason that an administrative process that does not provide the particular form of relief sought, i.e, money damages, does not proide an "available remedy" within the meaning of § 1997e(a). See *e.g., Perez*, 182 F.3d at 535. In such a case, exhaustion is found to be futile and an unnecessary roadblock to a prisoner's federal claim. *See id.*

The cases which find that exhaustion is required regardless of whether the relief is available focus on the fact that Congress changed the language of § 1997e(a) when the Act was amended in 1996. Prior to the amendment, the Act

provided that prisoners were required to exhaust "plain, speedy and effective" administrative remedies. See *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 892-94 (S.D.N.Y. 1998). Now, § 1997e(a) provides for exhaustion of "available" remedies. See § 1997e(a). Accordingly, this line of cases construe the amendment as requiring exhaustion without regard to whether the remedy is "effective." *See Beeson*, 28 F. Supp.2d at 893. To hold otherwise would essentially reintroduce the requirement that the remedy be "effective," despite the fact that Congress deleted it. *See Vasquez v. Artuz*, No. 97cv8427(JP), 1999 WL 440631 (S.D.N.Y. June 28, 1999). Moreover, because prisoners almost always seek money damages, crafting such an exception would effectively remove the exhaustion requirement entirely.[4/] *See id.* at *6. The Court finds this reasoning persuasive.

In addition, if exhaustion were required only in cases where the relief sought was available, there would be little, if any, effect on the flow of meritless prisoner cases filed in federal court in contravention of Congressional intent. *See* 141 Cong. Rec. s7525 (statement of Sen. Kyl). Moreover, exempting cases that seek money damages from the exhaustion requirement would involve federal courts in the tedious and intrusive process of "evaluat[ing] each cause of action and each type of relief sought in each prisoner's complaint [in order to] determine whether the [relevant administrative system] can grant adequate relief[;]" a result Congress plainly meant to avoid. *See Vasquez*, 1999 WL 440631, *6 *quoting *Alexender v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998)) (internal quotations omitted). Consequently, mandatory exhaustion will encourage prisoners to comply with administrative procedures by forcing them to report their complaints to prison officials promptly or risk forfeiture of such claims. *See Beeson*, 28 F.Supp.2d at 895. "In contrast, exempting money damages claims from the [exhaustion] requirement [of § 1997e(a)] would undermine whatever incentive inmates have to report their claims promptly because they could bring an action in federal court any time with[in] the applicable statute of

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4/ In fact, at oral argument, counsel for Nussle conceded this point.

limitations." *Id.* For these reasons, the fact that prisoners cannot recover money damages in an administrative grievance before the DOC is not a sufficient basis to avoid § 1997e(a)'s exhaustion requirement.

B. Excessive Force Claims

Court have also differed about whether cases alleging excessive force are actions "with respect to prison conditions" as that phrase is used in § 1997e(a). *Compare Carter v. Kiernan*, No. 98cv2664, 1999 WL 14014, at *2-4 (S.D.N.Y. Jan. 14, 1999) (holding that Eighth Amendment excessive force claims are not subject to PLRA exhaustion requirement); and *Baskerville v. Goord*, No. 97cv6413, 1998 WL 778396, at *3-6 (S.D.N.Y. Nov. 5, 1998) (holding that exhaustion requirement does not apply to Eighth Amendment excessive force claims); and *White v. Fauver*, 19 F. Supp.2d 305, 312-15 (D.N.J. 1998) (holding the same); with *Beeson v. Fishkill Correctional Facility*, 28 F. Supp.2d 884, 887-96 (S.D.N.Y. 1998) (holding that Eighth Amendment excessive force claims are subject to exhaustion requirement); and *Moore v. Smith*, 18 F.Supp.2d 1360, 1362-63 (N.D. Ga. 1998) (concluding the same).

Although the issue was recently before the Second Circuit, that court has yet to decide it. See *Liner v. Goorde*, No. 98-2925, 1999 WL 734693 (2d Cir. Sept. 22, 1999). In *Liner*, a prisoner brought a § 1983 excessive force claim which the district court dismissed sua sponte before the defendants were served. The court declined to resolve this complex legal issue without the benefit of a more complete record. *See id.*

Nonetheless, even without guidance from the Second Circuit on this complex issue, the Court concludes that the exhaustion requirement applies to cases alleging excessive force. The express lagnage of the PLRA provides for exhaustion of administrative remedies before a prisoner may bring a federal action relating to "prison conditions." *See Beeson*, 28 F.Supp.2d at 887-92. The use of excessive force by correctional officers falls into the category of "prison conditions."

Moreover, there is no support in the legislative history of the PLRA that, as Nussle argues, Congress intended to exempt excessive force claims from the exhaustion requirement. See 141 Cong. Rec. s7525 (statement of Sen. Kyl) (explaining the serious problem regarding the high number of meritless prisoner claims brought in federal court). To the contrary, the legislative history indicates that Congress intended to include excessive force claims within the coverage of § 1997e(a)'s exhaustion requirement. *See Beeson*, 28 F.Supp.2d at 892.

Specifically, there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation. *See Beeson*, 28 F.Supp.2d at 892. Creating an exception for excessive force claims would circumvent the Congressional purpose of weeding out frivolous claims before they are filed in federal court. See id.; *Navarrete v. Metro. Detention Ctr.*, No. 97cv4071, 1999 WL 294875 (E.D.N.Y. March 19, 1999). Thus, efficiency and judicial economy favor exhaustion of all prisoner claims prior to a federal lawsuit being brought.

For these reasons, and in the absence of binding precedent to the contrary, the Court finds that prisoner claims of excessive force under the Eighth Amendment are claims "with respect to prison conditions" and, thus, are subject to § 1997e(a)'s exhaustion requirement. Accordingly, because Nussle has failed to exhaust his remedies before the DOC, the complaint is dismissed.

CONCLUSION

For the reasons stated above, the defendant's Motion to Dismiss (doc. # 8] is GRANTED.

SO ORDERED this 22nd day of November, 1999 at Bridgeport, Connecticut.

/s/Alan H. Nevas
United States District Judge

42 U.S.C. § 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) **Dismissal.**

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) **Attorney's Fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) **Limitation on recovery.** No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) **Hearings.**

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) **Waiver of reply.**

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) **"Prisoner" defined.** As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

Supreme Court, U.S.
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No. 00-853

In The

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other Courts of Appeals, that an inmate bringing a claim for excessive force need not have exhausted administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement of 42 U.S.C. § 1997e(a)?

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the Plaintiff was Ronald Nussle.

In both courts below the defendants are listed as Correction Officer Willette and Correction Officer Porter.

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RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

The Respondent, Ronald Nussle prays that this Court deny the Petitioners' writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000.

The respondent believes that the petitioner's recitation of the jurisdictional statement is correct and that the jurisdiction lies in this Court at this time.

STATEMENT OF THE CASE

The respondent adopts the petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision in this case creates a split in the circuits on the issue of exhaustion of administrative remedies in the Prison Litigation Reform Act. However, this Court does not have pending before it a writ of certiorari on the issue directly on point in this case, to wit, whether exhaustion is required in an excessive force case because of the character of the claim

raised. Because the Court of Appeals correctly decided this issue, this Court should deny certiorari thus signaling to other circuits that the Second Circuit decision was correctly decided.

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DIRECTLY DECIDED THIS ISSUE AND THE ISSUE HAS NOT BEEN BROUGHT BEFORE THIS COURT ON A WRIT OF CERTIORARI FROM ANY OTHER CIRCUIT, THEREFORE REFUSING TO GRANT CERTIORARI IN THIS CASE WILL SIGNAL THAT THE DECISION WAS CORRECTLY DECIDED BY THE SECOND CIRCUIT.

Although the issue in this case was an issue of first impression in the Second Circuit, other circuits have decided the issue. Uniformly, those circuits rejected the position held by the Second Circuit. Interestingly, none of the parties claiming aggrievement in those cases successfully sought a Petition for Certiorari from this Court on the issue decided by the Second Circuit. Thus, although there is a split of authority among the circuits, this Court can, by upholding the Second Circuit decision, signal to the other circuits that this case was correctly decided.

This Court currently has been granted a writ of certiorari with regard to the case of *Booth v. Churner*, 206 F.3d 289, 293, 298 (3d Cir. 2000), cert. granted on other grounds, no. 99-1964 (October 30, 2000). In *Booth*, the issue before the Court is what exhaustion is required when the remedies that are available in an administrative procedure are not identical to the remedies available at

law. Thus, in *Booth*, the Third Circuit rejected a claim that because an administrative remedy procedure did not offer money damages, a prisoner was not obliged to exhaust administrative remedy.

The mere fact that this court has granted certiorari in *Booth* does not obliged it to grant certiorari in this case. It is possible that this Court will rule in *Booth* that because the petitioner in *Booth* was unable to obtain money damages by way of administrative procedure, that exhaustion is not required as a matter of law under the Prison Litigation Reform Act. Should the Court rule in that manner, given the fact that money damages are not available in the case at bar, *Booth* would effectively govern the Nussle case. Thus, if the Court grants certiorari in *Booth*, and rules against the proposition that exhaustion is required in each Prison Litigation Reform Act claim, the petitioners' request for certiorari in this case would be moot.

Alternatively, should the Court deny certiorari in *Booth*, it could nonetheless deny certiorari in this case without addressing the merits of the petitioners' argument. On this theory, failure to grant the writ of certiorari would signal to other circuits that the Second Circuit decision was not error. Of course, permitting things to remain in that awkward position might yield a further writ of certiorari from a petitioner in a circuit in which the law of the circuit already holds that exhaustion is required. However, that would be a topic for another day.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH *McCARTHY V. BRONSON*

The petitioner makes much of the alleged inconsistency of the Second Circuit's decision in the Nussle case with this Court's ruling in *McCarthy v. Bronson*, 500 U.S. 136, 111 S.Ct. 1737 (1991). Our Courts are not required to remain blind to legislative purpose and history when interpreting a statute. The petitioner seeks to persuade the Court that the Second Circuit erred in concluding that language applicable to the preservation of judicial resources was somehow applicable to cases involving violence against prisoners by state actors. The Second Circuit unambiguously concluded that the structure and the purpose of the Prison Litigation Reform Act was to deter frivolous litigation. There is nothing frivolous about a claim that a prisoner has been maliciously and sadistically abused by a prison guard.

As the Second Circuit concluded, the "structure, purpose and legislative history of the Prison Litigation Reform Act provide ample justification for not treating excessive force or assault claims" in the same manner as are treated claims about such things as the type of food or clothing that prisoners are required to wear. (See petitioner's brief at A17).

The mental state required to prove a case of unreasonable force against a corrections officer is the most culpable under the law. A prison guard who abuses a prisoner by means of excessive force is as a matter of law someone who engages in sadistic behavior. *Farmer v. Breenan*, 511 U.S. 825, 835-36 (1994). It is inconceivable

that Congress intended in the Prison Litigation Reform Act to apply the same standard that it deemed applicable to the conservation of the judicial resources to protection of the least vulnerable citizens within our society. There is nothing in the brief recited by the petitioner, nor in the legislative history relied upon, to support the contention that a prisoner who believes he has been made the target of sadist and malicious force needs to exhaust administrative remedies.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petitioner's request for certiorari.

Respectfully submitted:

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In The
Supreme Court Of The United States
October Term, 2000

CORRECTION OFFICER PORTER AND
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Petitioners,

v.

RONALD NUSSLE
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

This Court granted the petitioners' petition for a writ of certiorari on the following issue: "Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?"

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiff was Ronald Nussle.

In both courts below, the defendants are listed as Correction Officer Willette and Correction Officer Porter.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE
Petitioners,

v.

RONALD NUSSLE
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on August 24, 2000, is reported at *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), and is printed in the Joint Appendix at J.A. 54.

The memorandum of decision of the United States District Court for the District of Connecticut, *Nevas, J.*, dated November 22, 1999, is unreported, but is printed in the Joint Appendix at J.A. 43.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000. The petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1), petitioning for certiorari on November 22, 2000. This Court granted the petition on June 4, 2001.

STATUTORY PROVISION INVOLVED

The statutes at issue appear in the Joint Appendix at J.A. 19 (42 U.S.C. § 1997e); J.A. 23 (18 U.S.C. § 3626); and J.A. 31 (28 U.S.C. § 636).

STATEMENT OF THE CASE

The respondent-plaintiff Ronald Nussle, alleges that on June 15, 1996, while an inmate at the Cheshire Correctional Institute, the petitioners-defendants, Correction Officers Porter and Willette, acting under color of law, and jointly and in concert with each other, beat him without justification. (Complaint, ¶¶ 10-11; J.A. 38-39.) He claims the officers beat him because he was a friend of Gov. John G. Rowland. (*Id.* ¶9.) Nussle further alleges that he "was told that if he reported this beating the guards would kill him." (*Id.* ¶12; J.A. at 39.)

The District Court determined (J.A. 50), and Nussle has not contested, that he never filed a grievance with Connecticut's Department of Corrections regarding his allegations about the officers' alleged conduct, although he could have pursuant to Administrative Directive 9.6, promulgated by Connecticut's Commissioner of Corrections. (J.A. 5.) Instead, on June 10, 1999, just days before the three year statute of limitations would have lapsed; *see Williams v. Walsh*, 558 F.2d 667, 670 (2d Cir. 1977) (3 year statute of limitations for § 1983 actions); Nussle filed this civil rights action against the officers pursuant to 42 U.S.C. §1983, alleging that the officers' use of "excessive force" violated his Eighth Amendment rights.[1/]

The officers moved to dismiss Nussle's action for failure to exhaust his administrative remedies, as required by § 803 of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 State. 1321-73 (1996) ("PLRA"), *codified at* 42 U.S.C. § 1997e(a). This section of the PLRA provides that "no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." The District Court, *Nevas, J.*, granted the officers' motion, and Nussle appealed to the United States Court of Appeals for the Second Circuit, which vacated the District Court's judgment and remanded.

The Court of Appeals rejected the officers' argument and the District Court's determination that claims of excessive force are "actions . . . with respect to "prison conditions" requiring exhaustion under § 803, and instead "conclud[ed] that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983." *Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir. 2000). [2/]

1/ The Connecticut Attorney General appeared for both Correction Officer Porter and Correction Officer Willette in their official capacities, to the extent the plaintiff sought relief against state officials, but appeared only for Correction Officer Porter individually inasmuch as it had been determined that there was no Correction Officer named Willette. The District Court granted judgment in favor of both Porter and Willette, the latter of whom, of course, had never been served. (J.A. 52.)

2/ The District Court had also rejected Nussle's alternative argument that the PLRA's exhaustion requirement did not apply to him because his complaint asked only for money damages and the administrative remedy provided did not provide for damages as a

SUMMARY OF THE ARGUMENT

Section 803 of the PLRA, codified at 42 U.S.C. § 1997e(a), requires the exhaustion of administrative remedies for a prisoner's claim of excessive force. The phrase "action . . . with respect to prison conditions" in § 803's exhaustion provision includes a claim brought under § 1983 alleging excessive force by prison officials. The construction of the statutory phrase "prison conditions" as including an official's alleged use of excessive force is entirely consistent with a series of this Court's prior decisions interpreting substantively identical language. Indeed, it is apparent from the text, structure and history of the PLRA that Congress intended to incorporate this Court's broad understanding, reflected in decisions such as *McCarthy v. Bronson*, 500 U.S. 136 (1991), and *Wilson v. Seiter*, 501 U.S. 294 (1991), that the use of excessive force is encompassed in the meaning of the phrase "prison conditions."

Congress' purpose in requiring prisoner complainants to pursue administrative remedies was to reduce unnecessary prisoner lawsuits and the need for federal court intervention in the management of prisons. This purpose is served equally by requiring exhaustion of prisoner excessive force claims as it is for any other claim regarding prison conditions. As with any prison conditions claim, requiring exhaustion for excessive force claims allows for a prompt investigation of the allegations and, if warranted, remedial action, potentially eliminating the need for recourse to the courts.

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remedy. The Court of Appeals did not reach this issue, however, holding instead that excessive force claims fall outside the exhaustion requirement. This past term this Court unanimously rejected Nussle's alternative argument in *Booth v. Churner*, 121 S.Ct. 1819, 1825 (2001).

Moreover, in the very language of the PLRA, Congress reflected its intention to pursue these goals by extending broadly the exhaustion requirement. Specifically, although § 803 itself does not define the phrase "prison conditions," the closely related § 802 of the PLRA includes such a definition. Section 802's expansive definition -- which extends to both "conditions of confinement" and "the effects of actions by government officials on the lives of persons confined in prison" -- without question includes excessive force claims. Under the ordinary rules of statutory construction and in light of Congress' manifest purpose in enacting the PLRA, § 802's definition clearly informs § 803's use of the phrase "actions . . . with respect to prison conditions." To conclude otherwise would seriously undermine Congress' judgment that requiring exhaustion will serve to eliminate some of the unjustified burdens associated with prisoner litigation in the federal courts.

ARGUMENT

"The meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999). An examination of the context of § 803 of the PLRA reveals that an Eighth Amendment action against corrections officers for the alleged use of excessive force is an "action . . . with respect to prison conditions" within the meaning of the PLRA. Congress' intent to require the exhaustion of administrative remedies for excessive force claims is manifested in the statute itself and is reflected in the statute's legislative history and purpose. The decision of the Court of Appeals rejecting this proposition is contrary to a consistent line of this Court's precedents holding that single episodes -- including episodes of

excessive force -- constitute "conditions," and therefore under the PLRA require the exhaustion of administrative remedies. It is also contrary to the conclusion of every other circuit court that has addressed this issue.[3/]

A. THE HISTORY OF THE PLRA'S EXHAUSTION PROVISION REFLECTS CONGRESS' INTENT TO EXPAND THE SCOPE OF THE EXHAUSTION REQUIREMENT.

In determining the meaning of a word or phrase, the Court "consider[s] not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific **context** in which that language is used, and the broader **context** of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis supplied). In evaluating the "context" of § 803 of the PLRA, the Court must consider how the provision was amended and the circumstances surrounding its amendment. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Therefore, a brief, historical overview of the exhaustion of remedies doctrine in the context of actions brought pursuant to 42 U.S.C. § 1983, and the evolution of 42 U.S.C. § 1997e is appropriate. This overview illustrates that Congress has acted to expand the

[3/] *See Smith v. Zachary*, 2001 U.S. App. Lexis 14339, *6-7 (7th Cir. 2001); *Higginbothom v. Carter*, 223 F.3d 1259, 1260-61 (11th Cir. 2000); *Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000), *aff'd on other grounds* 121 S.Ct. 1819 (May 29, 2001); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999). *See also Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998) (implicit); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997) (same).

applicability of this provision and has resisted judicial attempts to narrow it.

The doctrine requiring the exhaustion of administrative remedies "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. . . . And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.*

With regard to inmate litigation specifically, this Court has observed: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). "[B]ecause most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Id.* at 492.

In *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982), this Court held that 42 U.S.C. § 1983 does not have a general exhaustion requirement. With regard to inmates' § 1983 actions, however, the Court, took note of 42 U.S.C. § 1997e, as it provided then,[4/] and recognized that

[4/] Before its amendment by the PLRA in 1996, 42 U.S.C. § 1997e(a) provided:

(1) Subject to the provisions of paragraph (2), in any action

"Congress [had] decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures." *Id.* at 509.

A decade later, in *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992), the Court held that the original § 1997e(a) was not mandatory. Rather, a court's discretionary determination to direct an inmate to exhaust his administrative remedies hinged on the court's finding that the available remedy was "plain, speedy, and effective," and that requiring its exhaustion would be "appropriate and in the interests of justice." *Id.*

Specifically to "preclude the *[Madigan]* result," *Booth v. Churner*, 121 S.Ct. 1819, 1825 (2001), Congress determined in 1996 that the rising number of federal civil rights actions brought by inmates required stronger legislative action. *See, e.g.*, 141 Cong. Rec. S26,548 (1995) (statement of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994). Increasingly large amounts of federal judicial time

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brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective.

and resources were being devoted to inmate actions, crowding federal dockets at every level. House Committee on the Judiciary, Violent Criminal Incarceration Act of 1995, H. Rep. No. 21, 104th Cong. 1rst Session 13 (1995) ("Too often prisoners initiate suits which are frivolous, malicious, or fail to state a claim for which relief can be granted. Such suits clog the courts, waste law enforcement resources, and hinder localities in their efforts to fight crime."). Many of these actions, Congress believed, were either frivolous, meritless or could have been addressed and rectified at the agency level. *See* 141 Cong. Rec. S14,572; S26,548; S26,553-54 (1995) (statements by Senators Dole and Kyl) (filing lawsuits has become a recreational activity for long-term residents of our prisons, because prisoners "have little to lose and everything to gain," and because filing frivolous complaints is "a means of gaining a short sabbatical in the nearest Federal courthouse"). *Cf., Cruz v. Beto*, 405 U.S. 319, 326-27 (1972) ("The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.") (Rehnquist, *J.*, dissenting).

Against this landscape and in response to the Court's narrow construction of § 1997e(a) in *Madigan*, *see Booth*, 121 S.Ct. at 1825, Congress in 1996 significantly strengthened the exhaustion requirement by enacting the PLRA, § 803 of which repealed the previous version of § 1997e and replaced it with the following provision:

> (a) **No action shall be brought with respect to prison conditions** under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), **or any other Federal law,** by a prisoner confined in any

jail, prison, or other correctional facility **until such administrative remedies as are available are exhausted**. (emphasis supplied)

This provision made significant changes to the language and operation of § 1997e(a). First, the exhaustion requirement is no longer restricted only to § 1983 actions, but has been expanded to apply to all cases "brought . . . under any other Federal law." *See Madigan*, 503 U.S. at 150 (§1997e previously held inapplicable to *Bivens* claims).

Second, as this Court held unanimously in *Booth v. Churner*, 121 S.Ct. 1819, 1824 (2001), itself an excessive force case decided last term, the previous discretionary scheme "is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy and effective' before exhaustion could be required." *Id.* at 1824. Thus, the exhaustion provision is now mandatory. *Id.* at 1824-25.

B. THE TEXT AND STRUCTURE OF THE PLRA AND THE EXHAUSTION PROVISION OF § 803 MANIFEST CONGRESS' CLEAR INTENT TO REQUIRE EXHAUSTION FOR EXCESSIVE FORCE CLAIMS.

The question in this case is whether Congress, in enacting what this Court in *Booth* described as the "obviously broader" and mandatory exhaustion requirement contained in the PLRA, intended by the term "prison conditions" to exclude claims of excessive force. *See Booth*, 121 S.Ct. at 1825. An examination of the PLRA as a whole reveals that Congress manifested no intent to

exempt such claims from the exhaustion requirement, but rather that Congress intended that an "action . . . with respect to prison conditions" include claims of excessive force.

The Court starts, "as always, with the language of the statute." *Williams v. Taylor*, 120 S.Ct. 1479, 1487 (2000). In this regard, it is appropriate to note the broad, mandatory and general rule that § 803 articulates: **"No action** shall be brought with respect to prison conditions . . . by a prisoner confined . . . until such administrative remedies as are available are exhausted." (emphasis supplied).

Thus, the Court of Appeals' first error in this case was to construe the term "action . . . with respect to prison conditions" against the backdrop of this Court's general rule in *Patsy* that exhaustion is not mandatory for § 1983 claims, instead of against Congress' specific rejection of the *Patsy* rule for inmate litigation. *Nussle*, 224 F.3d at 98. Congress established a new general rule of mandatory exhaustion for inmate suits,[5/] and as this Court has noted, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Moreover, if there were any ambiguity about whether Congress intended the phrase "action . . . with respect to prison conditions" to include excessive force

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[5/] This conclusion is buttressed by the title of § 803, "Suits By Prisoners," which does not connote any limitation upon the types of suits the section addresses. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (the title of a statute and the heading of a section are tools available for the resolution of doubt about the meaning of a statute).

claims, that ambiguity is clarified when the phrase is read in the light of this Court's interpretations of similar terms in similar contexts, as well as in light of other sections of the PLRA.

1. This Court Has Consistently Construed "Prison Conditions" Cases To Include Excessive Force Claims.

Construing the phrase "action . . . with respect to prison conditions" to include excessive force claims is entirely consistent with this Court's precedents regarding inmate cases, and specifically consistent with its Eighth Amendment jurisprudence.

In *Preiser v. Rodriguez*, 411 U.S. 496, 498-499 (1973), this Court faced the question of whether inmates alleging unconstitutional deprivations of good time credits can seek equitable relief under 42 U.S.C. § 1983, or whether they must seek habeas corpus relief. Noting that the "essence of habeas corpus is an attack by a person in custody upon the legality of that custody," *id.* at 484, and acknowledging the "literal applicability" of § 1983 to a claim of unconstitutional confinement, *id.* at 489, this Court held that the inmates' sole federal remedy in a claim involving the duration of confinement is a writ of habeas corpus. *Id.* at 500.

The Court in *Preiser* distinguished between "prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement," and challenges to "the very fact or duration of the confinement itself." *Id.* at 499. For the latter category of cases, when the relief sought is immediate or speedier release from prison, this Court then held that the prisoner's

"sole federal remedy is a writ of habeas corpus." *Id.* at 500. For the former category of cases, the Court held that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the **conditions of his prison life**, but not to the fact or length of his custody." *Id.* at 499 (emphasis supplied).

The Court of Appeals below attempted to draw a distinction in Eighth Amendment jurisprudence between excessive force claims, on the one hand, and other conditions of confinement claims on the other. As it relates to § 803, the Court of Appeals reasoned, isolated or "particular" instances of excessive force do not constitute a "prison condition," while other, more systemic attributes of prison life do. *Nussle*, 224 F.3d at 99-101. This Court has already rejected such a distinction in "conditions" cases generally and Eighth Amendment cases specifically.

Indeed, in *Preiser*, the Court cited examples of inmate claims properly brought as civil rights actions challenging "the conditions of their confinement," including three cases -- *Cooper v. Pate*, 378 U.S. 546 (1964) (denial of religious publications); *Houghton v. Shafer*, 392 U.S. 639 (1968) (confiscation of legal materials); *Haines v. Kerner*, 404 U.S. 519 (1972) (placement of the prisoner in solitary confinement) -- involving single instances of alleged unconstitutional conduct.

Even more instructive is *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991). In that case, the Court addressed the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B) (J.A. 31), which permits District Courts, without consent, to refer certain cases, including "prisoner petitions challenging conditions of confinement," to magistrate judges for trial, proposed findings of fact and recommended dispositions in order to lessen the burden of inmate cases on District

Courts. The inmate in *Bronson* had brought an Eighth Amendment claim for excessive force that he claimed did not fall within the term "conditions of confinement," and therefore, he claimed, could not be referred to a magistrate judge without his consent.

This Court reemphasized that its opinion in *Preiser* "had described two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *Id.* at 140. In construing the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B), the Court noted that the language in that statute "describes these same two categories." *Id.* at 141. The Court stated: "We do not quarrel with petitioner's claim that the most natural reading of the phrase 'challenging conditions of confinement,' when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context." *Id.* at 139. The Court went on to note that the "text of the statute does not define the term 'conditions of confinement' or contain any language suggesting that prisoner petitions should be divided into subcategories." *Id.* On the contrary, when the relevant section is read in its entirety, "it suggests that Congress intended to authorize the nonconsensual reference of **all** prison petitions to a magistrate." *Id.* at 139 (emphasis supplied).

In rejecting the inmate's argument in *Bronson* -- repeated by Nussle and the Court of Appeals in this case -- that "the ordinary meaning of the words 'conditions of confinement' includes continuous conditions and excludes isolated incidents," *id.* at 139, the Court specifically noted that *Cooper*, *Houghton* and *Haines* each involved challenges to specific instances of unconstitutional conduct, which the *Preiser* Court had described as challenges to

"conditions of confinement." *Id.* at 142. Moreover, the Court noted, its construction "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases. Petitioner's definition would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.* at 143.

Shortly after *Bronson*, this Court again rejected the distinction between short-term and long-term "conditions" that would constitute Eighth Amendment violations. In *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991), the inmate argued specifically that for "short term" Eighth Amendment claims, such as medical deprivation, there is a state of mind requirement (requiring at least "deliberate indifference"), but that no such proof of state of mind should be necessary to make out a "long term" Eighth Amendment claim, such as for deprivation of heat or food. The Court held that distinguishing between situations on a temporal basis is illogical and impractical, and more importantly found no support in the Eighth Amendment itself:

> Petitioner, and the United States as *amicus curiae* in support of petitioner, suggests that we should draw a distinction between "short-term" or "one-time" conditions (in which a state-of-mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this

> Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment.

Id. at 300.

Thus, for example, claims regarding inadequate medical attention, lodging two inmates in a cell or the shooting of an inmate by a guard, each required inquiry into the prison official's state of mind under the Eighth Amendment. *Id.* at 297-99, *citing Estelle v. Gamble,* 429 U.S. 97 (1976); *Rhodes v. Chapman,* 452 U.S. 337 (1981); *Whitley v. Albers,* 475 U.S. 312 (1986). In response to the concurrence's contention in *Wilson* -- which echoes in the Court of Appeals' decision in this case -- that these examples did not involve "conditions of confinement," but rather "specific acts or omissions directed at individual prisoners," the Court stated:

> if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not. . . .

Id. at 299 n.1 (emphasis in original).

In concluding that there is no practical or constitutional distinction between "one-time" conditions and "systemic" conditions, the Court in *Wilson*, as it had in *Bronson*, recognized the impossible task that District

Courts would face in attempting to differentiate between long term and short term "prison conditions":

> The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent, . . . but there is no logical reason why it should cause the requirement of intent to evaporate. The proposed short-term/long-term distinction also defies rational implementation. Apart from the difficulty of determining the day or hour that divides the two categories (Is it the same for all conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 143-144 (1991).

Id. at 300-01 (citations omitted).

The Court of Appeals below suggested that this Court's Eighth Amendment jurisprudence supports a distinction between excessive force claims and "prison conditions" claims. The cases cited by the Court of Appeals -- *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), and *Farmer v. Brennan*, 511 U.S. 825, 834-36 (1994) -- stand only for the proposition that excessive force claims and other prison condition claims have differing state-of-mind requirements, **not** that an excessive force claim is for all purposes something other than a prison condition claim. To import the distinction drawn solely for the purpose of articulating the appropriate elements for different categories of prison condition claims into § 803's use of the phrase "prison conditions" would stretch the reasoning of *Hudson* and *Farmer* well beyond its reach and would run directly counter to a common sense understanding of Congress'

intent in light of *Wilson* and *Bronson*. Nothing in the text or legislative history of the PLRA suggests that Congress intended to incorporate these substantive standards for claims under the Eighth Amendment to differentiate between the types of prisoner actions that should be subjected to exhaustion.

Moreover, exempting excessive force and other "episodic" claims from the interpretation of "actions . . . with respect to prison conditions," would, contrary to *Bronson* and *Wilson*, require the district courts continually to make and revisit judgments about which kinds of claims are systemic, for purposes of exhaustion, and which are not. Does excessive force become a systemic condition of confinement subject to exhaustion if it is widespread or occurs with regularity over time? If so, how long must the pattern endure? How many inmates must be affected by how many staff members? Must the force and circumstances be identical in all instances? *Cf.*, *Wilson v. Seiter*, 501 U.S. at 300-01.

Indeed, in a series of decisions in the wake of *Nussle*, the Second Circuit Court of Appeals has begun to illustrate the ramifications of its decision in this case. In these decisions, that Court has taken the exemption from exhaustion well beyond excessive force claims -- thus abandoning the apparently dispositive distinction it drew in *Hudson* and *Farmer* -- and has espoused the proposition that exhaustion is only required for prisoner claims involving prison policy or systemic practices. *E.g.*, *Marvin v. Goord*, 255 F.3d 40, (2d Cir. 2001) (claims of denial of access to mail, violation of religious freedom, deliberate indifference to medical needs); *Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001) (challenge to drug testing procedures); *Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001) (alleged retaliation for complaints about prison

official's conduct), *petit. for cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001). This approach would undermine the PLRA's purpose of easing the burdens on federal courts created by prisoner litigation. *See Freeman v. Francis*, 196 F.3d 641, 643-45 (6th Cir. 1999). Further, this approach would lead to the absurd result in which widespread, systemic uses of force or brutality, impacting many inmates, must be administratively exhausted, while single episodes of excessive force can proceed immediately to federal court.

Applying the phrase "action . . . with respect to prison conditions" broadly, as the Court has done with similar phrases in *Wilson* and *Bronson*, obviates the need to engage in such arbitrary line drawing and categorizing.

2. In The PLRA, Congress Adopted This Court's Understanding That "Actions With Respect To Prison Conditions" Includes Excessive Force Claims.

Congress plainly intended to use the phrase "actions . . . with respect to prison conditions" in § 803 in the broad sense employed by this Court in *Wilson* and *Bronson*. Additional support for this conclusion is found in the language of other portions of the PLRA. As it did in the Magistrate's Act at issue in *Bronson*, Congress by the very terms of the PLRA, has expressly adopted this Court's understanding that there are "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991). By excluding "habeas corpus proceedings challenging the fact or duration of confinement

in prison"[6] from the definition of "actions with respect to prison conditions" in the closely related § 802 of the PLRA, Congress articulated this same categorization for purposes of § 803 exhaustion.

a. The Definition Of "Action With Respect To Prison Conditions" Contained In § 802 Of The PLRA Illuminates The Meaning Of The Same Phrase In § 803.

Although § 803 of the PLRA (42 U.S.C. § 1997e(a)) does not contain a definition of the phrase "action . . . with respect to prison conditions," the immediately preceding and closely related section of the PLRA, § 802, codified at 18 U.S.C. § 3626, does contain such a definition. Specifically, § 802 provides that:

> [T]he term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the **conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison,** but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. (emphasis supplied).

"[L]anguage used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993). *See also Commissioner v. Lundy*, 516 U.S. 235, 250 (1996). Indeed, "[t]he normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986), *quoting Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). *See also Miller v. French*, 530 U.S. 327, 336 (2000) (construing automatic stay provision of § 802 in context of statute as a whole). There are compelling reasons to follow the "normal rule" in this case.[7]

Given the proximity of the two sections within the PLRA, there could hardly be a clearer case in which to presume that Congress intended that the term have the same meaning in different parts of the same act. Section 802 of the PLRA, which limits the type and the scope of remedies available in prison cases, immediately precedes the exhaustion provision in § 803, and both sections were passed at the same time. *See Commissioner v. Lundy*, 516 U.S. 235, 249-50 (1996) ("we have been given no reason to believe that Congress meant the term 'claim' to mean one thing in section 6511 but to mean something else altogether **in the very next section of the statute**") (emphasis supplied).

Moreover, § 802 shares a general purpose with § 803: curbing the extent to which federal courts expend resources on and become entangled with the administration of state and federal prisons.[8] *Booth*, 206 F.3d at 294. *See*

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[6] State inmates' habeas corpus petitions have their own exhaustion of remedies requirement. 28 U.S.C. § 2254(b)

[7] Although § 802's definitional section begins with the phrase "[a]s used in this section," this does not preclude its use in construing § 803, particularly in light of the compelling evidence of congressional intent supporting its use and the absence of definitions in § 803. *See Vermont Agency of Natural Resouces v. United States ex rel. Stevens*, 529 U.S. 765, 784 & nn.13-14 (2000) (noting that applying a definition of a term from one statutory section for the purposes of a second section, where that term is not defined in the definitional section of the second section, is inappropriate, particularly given other evidence of intent that did not support its application).

[8] The Court of Appeals below took the view that sections 802 and

also Lewis v. Casey, 518 U.S. 343, 361 (1996) (deferring to prison administrators to "make difficult judgments concerning institutional operations"); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (same); *Preiser*, 411 U.S. at 492 (1973) ("[B]ecause most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently

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803 of the PLRA "advance distinct statutory purposes," justifying a different construction of the same phrase found in adjacent sections of the act. *Nussle*, 224 F.3d at 103. "While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get to court, 18 U.S.C. § 3626 -- codified in an entirely different title of the U.S. Code -- is concerned with the different purpose of preventing 'courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Id.* (quotation omitted). This view is far too myopic. As the Seventh Circuit has held, and as the legislation's title ("Prison Litigation Reform Act") indicates:

> Both sections are devoted to various aspects of prison litigation, including: settlement agreements, the appointment of special masters, attorneys' fees awards, the use of telephonic hearings, waiver, and limitations on recovery. Neither statute is a one-issue act and both are tailored to address problems unique to incarcerated litigants. More importantly, both are part of the same legislation with the same overarching objectives -- to enable prison officials to resolve complaints internally and to limit judicial intervention in the management of state and federal prisons.

Smith, 2001 U.S. App. Lexis 14339, at * 4.

Moreover, the view that the two sections have different purposes, and therefore cannot share the same definition, begs a fundamental question: does the Court have to seek, or should Congress be presumed to have intended, an entirely different definition for a term in a different section merely because the two sections are aimed at different, although clearly related, ends?

and properly handled by the state administrative bodies and state courts.").

Thus, "[t]he interrelationship and close proximity of these provisions of the statute presents a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Lundy*, 516 U.S. at 250, *quoting Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). It is therefore entirely reasonable and proper to assume that Congress intended the definition of "action with respect to prison conditions" found in § 802 of the PLRA to inform the construction of the same phrase in § 803.

b. Under Either Prong of § 802's Definition, An Excessive Force Claim Is An "Action . . . With Respect To Prison Conditions."

So that there could be no mistake about the expansiveness and inclusiveness of the new and mandatory exhaustion requirement, Congress defined "action with respect to prison conditions" in § 802 broadly to include not only the often-used term "conditions of confinement," but the more encompassing phrase "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2). Under either prong of the § 802 definition, the Court should conclude that excessive force claims are subject to exhaustion.

Indeed, "a common sense reading" of the phrase "prison conditions" in § 803, and of either prong of the definition contained in §802, compels the conclusion that Congress has textually manifested its intent to include excessive force claims within the scope of the PLRA's mandatory exhaustion provision. *Booth*, 206 F.3d at 295. In fact, by the dual definition in § 802, it has expressed this

intent "even more clearly" than it did in the Magistrate's Act, construed in *Bronson*. *Id.* To accept the view of the Court of Appeals and of Nussle would mean, anomolously, that the two pronged definition found in § 802 ("conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison") would be narrower than the single term "conditions of confinement" in the Magistrate's Act, which in *Bronson* sufficed to include excessive force claims. *Id.* at 296 n.5.[9/]

i) The Phrase "Conditions Of Confinement" Includes Excessive Force Claims.

The phrase "prisoner petitions challenging **conditions of confinement**" in § 802 is essentially identical

[9/] The phrase "action brought with respect to prison conditions" appears in another subsection of section 803 of the PLRA -- 803(7) -- which is codified at 42 U.S.C. 1997e(c). That section provides that a district court may dismiss sua sponte any "action brought with respect to prison conditions" that is "frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune." 42 U.S.C. 1997e(c). If the definition of "civil action with respect to prison conditions" contained in Section 802 does not apply to Section 803, a district court has no discretion under 803(7) to dismiss an excessive force claim that is frivolous, malicious, fails to state a claim, or seeks monetary damages from an immune defendant," even if such claim is patently a product of fantasy or delusion. This result clearly undercuts the PLRA's purpose of reducing the burdens placed on district courts by inmate lawsuits. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a **substantive effect that is compatible with the rest of the law.**" *United States Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (emphasis supplied, internal citation omitted).

to "actions . . . with respect to **prison conditions**," found in § 803. The phrases on their face appear synonymous.

Evidence that Congress intended them to have the same meaning is its definition "action with respect to prison conditions" to include "proceeding . . . with respect to conditions of confinement." As discussed above, in a very similar context, this Court in *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991), has already construed "conditions of confinement," to encompass specific episodes of unconstitutional conduct by prison officials, **including Eighth Amendment claims of excessive force.** The Court stated: "The broader reading we adopt . . . comports with the policy behind the Act. . . . to assist federal judges 'in handling an ever-increasing caseload'" by allowing the "referral of broader category of cases." *Id.* at 142-43, *quoting* S. Rep. No. 94-625, p. 2 (1976).

This Court has often held that "Congress will be presumed to have legislated against the background of our traditional legal concepts"; *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); specifically that Congress is presumed to be aware of this Court's interpretations of its statutes; *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866 (1978); and that Congress is presumed to expect its statutes to be read in conformity with the Court's precedents. *United States v. Wells*, 519 U.S. 482, 495 (1997). Thus, by enacting a 1996 statute that relates to inmate litigation and the preservation of federal judicial resources against a legal landscape in which the Court in its 1991 *Bronson* opinion had construed the same phrase ("conditions of confinement") to include excessive force claims, Congress plainly manifested an intent to include allegations of excessive force within the sweep of the Act. *See Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

The Court of Appeals made no effort whatsoever to deal with this precedent. In fact, the Court of Appeals' statement that "'conditions of confinement' is 'no more apt' to include particular instances of assault or excessive force than the reference to 'prison conditions'" in § 803 demonstrates a total disregard for *Bronson's* holding. *Nussle*, 224 F.3d 95 at 102.

ii) The Phrase "The Effects Of Actions By Government Officials On The Lives Of Persons Confined In Prison" Includes Excessive Force Claims.

As the Third Circuit has reasoned, the phrase "the effects of actions by government officials on the lives of persons confined in prison" refers "to civil actions ranging from excessive force actions . . . to actions 'with respect to' a prison official's decision not to make basic repairs in the prison, or intentionally to deny a prisoner food, heating or medical attention. All of these actions affect the lives of prisoners similarly. They make their lives worse." *Booth*, 206 F.3d at 295. *See also Smith v. Zachary*, 2001 U.S. App. Lexis 14339, * 5-6 (7th Cir. 2001) ("He was affected by an action, allegedly an assault, by government officials, viz., prison guards."). Plainly, a guard's alleged use of excessive force falls within "the effects of actions by government officers" upon Nussle's life, and thus within the PLRA's exhaustion provision. Every other Court of Appeals that has addressed the issue has so concluded, contrary to the Second Circuit in this case. *See Higginbothom v. Carter*, 223 F.3d 1259, 1260-61 (11th Cir. 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999).

In considering the § 802 definition, the Court of Appeals below thought the language too "awkward" to "ordinarily" describe instances of excessive force. Specifically, it quoted the dissent from the Third Circuit decision in *Booth*, which argued:

> A guard hits you in the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Nussle, 224 F.3d at 103, *quoting Booth*, 206 F.3d at 302 (Noonan, *J.*, dissenting in relevant part).

This observation proves too much, however, since it could be made just as persuasively about a lawsuit against a prison barber for a bad haircut, or against a warden for failing to invite an inmate to a pizza party, episodes described in the legislative history as among the paridigmatic lawsuits that the PLRA sought to discourage. *See* 141 Cong. Rec. S26,548 (1995) (statement of Sen. Dole). "Would you report [the bad haircut or the pizza party slight] by saying, 'A government official has taken an action having an effect on my life?'" *Nussle*, 224 F.3d at 103, *quoting Booth*, 206 F.3d at 302 (Noonan, *J.*, dissenting in relevant part). What the Court of Appeals in this case and the dissenting judge in *Booth* describe is simply a reflection of the formality of legislative language and the imprecision that often accompanies a legislature's attempt to sweep broadly.

C. THE PLRA'S LEGISLATIVE HISTORY PLAINLY DEMONSTRATES AN INTENT THAT THE EXHAUSTION REQUIREMENT APPLIES TO EXCESSIVE FORCE CLAIMS.

The legislative history of the PLRA exhaustion provision also supports a construction of the term "prison conditions" that includes excessive force claims. Both the manner in which the provision was amended and the legislative statements that accompanied Congress' action undermine any conclusion to the contrary. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 557, 580-82 (1995) (legislative history given weight when speaks with clarity regarding statutory question).

"Congress did not enact the PLRA in a vacuum." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998). Rather, Congress took note of the fact that the increase in cases brought by inmates was causing gridlock in the nation's federal courts. 141 Cong. Rec. S14,571; S26,548 (1995) (statements of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994); 141 Cong. Rec. S14,572 (1995) (statement of Sen. Kyl) (in 1994, prisoners brought more than one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed). In reporting the 39,000 lawsuits filed by inmates in federal courts in 1994, Senator Hatch noted that this number specifically excludes "habeas corpus petitions or other cases challenging the inmate's conviction or sentence." 141 Cong. Rec. S26,553 (1995) (statement of Sen. Hatch). This is consistent with this Court's understanding in *Preiser, Wilson* and *McCarthy* that there are two categories of prisoner cases -- conditions cases and habeas cases. Moreover, the 39,000 figure derives from a Department of Justice study that specifically

includes excessive force claims within its ambit, demonstrating that Congress intended to include excessive force cases within the PLRA exhaustion requirement.[10/] R. Hanson and H. Daley, *U.S. Dept. of Justice, Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (1995).

The Court of Appeals below ignored these legislative statements completely, choosing to rely instead upon the statements about lawsuits over the types of peanut butter provided in prison and the failure to be invited to a pizza party. 141 Cong. Rec. S14,413 (1995) (statement of Sen. Abraham). These statements are admittedly more prevalent in the legislative history, but only because they so vividly illustrate the types of lawsuits prison officials confront. The statements by no means provide a basis for concluding, as the Court of Appeals did here, that Congress intended to distinguish between claims that may be frivolous as to subject matter versus claims that could be meritorious if proven factually. *Nussle*, 224 F.3d at 105. The Court of Appeals' embellishment upon the legislative language and its conclusion that the exhaustion requirement applies only to claims that are "frivolous as to subject matter" are unwarranted for several reasons.

First, while restricting frivolous claims was one purpose of the PLRA, and § 803 specifically; *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998) (Congress concluded that prisoners file more frivolous lawsuits than

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[10/] It is also clear from statements on the floor of the Senate that members of Congress understood that this amendment would apply to excessive force cases. *See* 141 Cong. Rec. S14,628 (1995) (statement of Sen. Biden) (opposing the PLRA and discussing two prison assault cases as examples of suits that would be hindered by the passage of the PLRA); 141 Cong. Rec. S14,570 (1995) (Statement of Sen. Dole) (referring to "cruel and unusual punishment" complaints).

any other class of persons); 141 Cong. Rec. S26,548; S26,553; S14,572; H35,624 (Statements of Dole, Hatch, Kyl, LoBiondo) (1995) (§ 803 intended to "curtail the ability of prisoners to bring frivolous and malicious lawsuits" by requiring exhaustion); it was not the only purpose. "[N]or is it the only benefit garnered from requiring litigants to utilize the prison grievance process before filing suit in court." *Smith*, 2001 U.S. App. Lexis 14339, at *10. As evidence of this, § 803(a) does not confine itself to "frivolous" cases, let alone cases "frivolous as to subject matter." There simply is no principled way, based on the statutory language and legislative history, to carve out excessive force claims from the universe of claims that prisoners might bring, some of which undoubtedly may raise serious constitutional issues, and some of which may not. The legislation leaves no room for a court to assess the substantiality of the allegations before deciding whether exhaustion is required. Instead a court looks only to whether the inmate has exhausted available administrative remedies; if he has not, the court must dismiss the action.

Moreover, § 803(7), codified at 42 U.S.C. § 1997e(c), specifically addresses frivolous suits. This subsection gives courts the power, on their own motion and without requiring exhaustion, to dismiss actions "with respect to prison conditions" "if the court is satisfied that the action is frivolous, malicious or fails to state a claim." *See* note 9 *supra*. Consequently, the Court need not -- and in fact should not -- read a frivolousness component into subsection (a).

Finally, as the Seventh Circuit aptly noted: "Excessive force claims can be frivolous." *Smith*, 2001 U.S. App. Lexis 14339, at *14. Inmates can, and often do, fabricate or embellish claims of excessive force. This

Court has explicitly recognized that the term "frivolous," "when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

Requiring that inmates exhaust those claims before bringing them to federal court furthers, and does not undercut, the policies of the PLRA generally, and the exhaustion requirement specifically. The statistical data that was presented to Congress regarding the flood of inmate cases "supports the conclusion that § 1997e(a) applies to *all* prisoner lawsuits, all of which have the *potential* to be frivolous and unduly burden courts, rather than a particular subcategory of claims . . . ." *Booth*, 206 F.3d at 298 n.9 (emphasis in original).

In short, to accept the view of Nussle and the Court of Appeals below, this Court would have to conclude that in passing the PLRA, Congress intended to exclude from its reach one out of the myriad types of § 1983 claims that prisoners might file. Not only is there nothing in the statute's plain language to support this argument, there is nothing in the legislative history of the Act that could in any way lead the Court to this conclusion. As the District Court stated below: "there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation." (J.A. 50)

D. BOTH THE PURPOSE OF THE PLRA AND THE POLICY UNDERLYING EXHAUSTION ARE WELL-SERVED BY APPLYING § 803 TO EIGHTH AMENDMENT EXCESSIVE FORCE CLAIMS.

Reading the term "prison conditions" to include excessive force claims like Nussle's is consistent with the purposes of the PLRA: to reduce the number of prisoner lawsuits and to reduce federal court intrusion into the management of prison systems. *See Booth v. Churner*, 121 S.Ct. 1819, 1823 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000). Moreover, it is consistent with the policies underpinning the exhaustion doctrine.

In passing the PLRA, Congress took note of the fact that nearly one-quarter of all civil cases commenced in the District Courts were commenced by inmates. *See* 141 Cong. Rec. S14,572 (1995) (statement of Sen. Kyl). It is therefore no exaggeration to state that this Court's ruling on this issue will impact upon thousands of cases in the federal courts.

To the extent that Congress intended that the exhaustion requirement might deter inmates from making allegations of excessive force that are fictitious, or in some fashion might provide the inmate with relief that will prevent him from bringing a federal action (e.g., relocation of the inmate or reassignment of a guard), the provision will have served both its legislative purpose, and the purpose of exhaustion generally.

In addition, Congress intended by the PLRA to "reduce the intervention of federal courts into the management of the nation's prison systems." *Booth*, 206 F.3d at 295; *Freeman*, 196 F.3d at 644. As applied to state prison systems, such as Connecticut's, this goal is

consistent with this Court's view that "the strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Lewis v. Casey*, 518 U.S. 343, 362 (1996); *see Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). This policy is just as applicable to a prison system's right and obligation in the first instance to review and address within the prison administration claims of excessive force.

Moreover, the requirement that an inmate exhaust his administrative remedies, even for a claim of excessive force, serves an important policy associated with the exhaustion doctrine generally and with the PLRA exhaustion requirement particularly. Specifically, such a requirement compels an inmate to make his allegation in a timely fashion, thereby providing the correctional facility with the opportunity to conduct a prompt investigation into the matter. This result benefits the interests of both the facility and the inmate by providing prison administrators with notice of the incident and the ability to take prompt corrective action, if warranted, while protecting the facility and its employees from stale or fabricated allegations that might be impossible to investigate thoroughly, or defend, years later. In the event an investigation reveals merit to an inmate's claim, it also permits the facility to promptly root out dangerous employees and corruption, which jeopardize not only the safety of inmates, but also the security of the institution and the morale of the staff. *Smith*, 2001 U.S. App. Lexis 14339, at *12-13.

As the Sixth Circuit has stated:

> A broad exhaustion requirement that includes excessive force claims effectuates

> [the] purpose [of the statute] and maximizes the benefits of requiring prisoners to use prison grievance procedures before coming to federal court. Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.

Freeman, 196 F.3d at 643-45 .

Requiring exhaustion in excessive force cases, as much as in other cases (if not more), also advances the policy of permitting the prison administration to create a timely and accurate record of the conduct and actions complained of by those close to the scene, as well as help "focus and clarify poorly pled or confusing claims, and [force] the prison to justify or explain its internal procedures." *Booth*, 206 F.3d at 299 n.9.[11/]

This case is a particularly good example of why administrative remedies should be exhausted even in excessive force cases. Nussle waited nearly three years to

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[11/] Congressman LoBiondo paraphrased a letter from former United States Attorney General Richard Thornburgh on the House floor, commenting that the administrative process could assist the district courts in fact-finding and focus the court on the issues: "An administrative review process would also aid the Federal courts by allowing for preliminary fact-finding and the creation of a record at the Bureau level, so as to clarify the issues to be presented to the court." 141 Cong. Rec. H35,623-24 (1995). This is no less true in an excessive force case. *See also Booth*, 121 S.Ct. at 1823 ("one may suppose that the administrative process itself would filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom, even absent formal fact-finding); *Madigan*, 503 U.S. at 145 (noting exhaustion "may produce a useful record for subsequent judicial consideration"); *Smith*, 2001 U.S. App. Lexis 14339, at *10, 13 ("The process also helps develop the factual record, before the prisoner moves to the courtroom. . . . [This] "may help rather than hinder prisoners, enabling them to succinctly present their cases.").

bring his § 1983 action. Although he complied with the statute of limitations, the timing of his filing puts prison officials and the individual defendants at a disadvantage in defending the action, and if his allegations are to be believed, left potentially abusive officials in place without sanction for three years. The filing of a grievance immediately after the alleged incident could have addressed both of these concerns.[12/]

A chief objection to a construction of the phrase "action . . . with respect to prison conditions" that includes excessive force claims within the exhaustion requirement is the implicit assumption that the prison will not seriously address the claim, and that this extra requirement will simply prevent inmates from vindicating their claims. There are at least two responses to this concern.

First, Congress did not, and this Court should not, indulge in a presumption that a prison administration will not seriously investigate misconduct by its officials. *Cf. Preiser*, 411 U.S. at 494-95 ("there is no reason to assume that state prison administrators . . . will not act expeditiously."). The theory of the legislation, as well as the theme of this Court's precedents, affords the prison

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[12/] Further, if the incident ever happened, Nussle himself would have benefited from the administrative review, as demonstrated by his naming of Correction Officer Willette as a defendant. As the petitioners alerted Nussle and the courts below, no such officer exists, but by the time that fact became clear to the plaintiff, the statute of limitations had expired. Had he pursued a timely grievance of this matter, however, it is likely he not only would have discovered that "Willette" was not the name of any correctional officer, but likely would have been able to correctly identify the other "unknown correctional officers" who allegedly participated, (Plaintiff's Complaint, paragraph 10. (JA 39)) and the identities of other persons who might have witnessed the alleged incident, if it in fact occurred. Thus, a prompt and mandatory grievance procedure will benefit not only the courts, but also the interests of inmates and correctional facilities alike.

administration the opportunity in the first instance to investigate these claims and take corrective action if necessary. *Id.* at 491-92.

Second, this argument is nothing more than a claim of futility, which this Court has rejected generally with regard to mandatory exhaustion provisions, and specifically with regard to the PLRA exhaustion provision itself. This Court has held: "Where exhaustion is a statutorily specified prerequisite, the requirement . . . may not be dispensed with merely by a judicial conclusion of futility." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). In *Booth v. Churner*, specifically, this Court has held that the PLRA's exhaustion provision is mandatory, and adheres notwithstanding that "the odds of keeping the matter out of court are slim," and even if it were true that the "prisoner would be clearly burdened, while the government would obtain little or no value in return." 121 S.Ct. at 1825. "Although we have not accorded much weight to [the] possibilities [of administrative benefits] in the past . . . Congress [after *McCarthy v. Madigan*] . . . may well have thought we were shortsighted." *Id.*

Finally, requiring exhaustion will not prevent Nussle or others with constitutional grievances from ultimately filing federal actions to obtain damages for them. *Smith*, 2001 U.S. App. Lexis 14339, at *12-13 ("The requirement is not designed to stop prisoners from filing suits, but rather to facilitate the litigation process."); 141 Cong. Rec. S27,042 (1995) (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."). Rather, Congress has simply added a preliminary exhaustion requirement prior to the commencement of suit, and has done so because it has determined, after holding hearings and gathering information, that inmate cases

generally have less merit and clog the federal courts more than do other classes of cases.

Said another way, the petitioners do not deny, as the Court of Appeals seems to have believed they do, that there is a "difference between punching a prisoner in the face and serving him unappetizing food." *Nussle,* 224 F.3d at 106, *quoting Hudson v. McMillan*, 503 U.S. 1, 11 (1991). The point simply is that Congress intended the exhaustion requirement to encompass both types of claims.

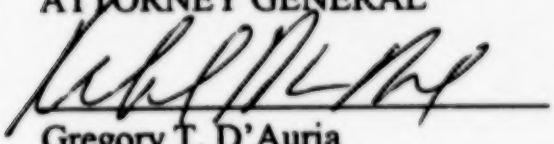
CONCLUSION

Given this Court's construction of similar language in *Bronson*, the context of the legislation, the breadth of its intended application and the legislative history surrounding its enactment, the most reasonable construction of the language of § 1997e(a) is that Congress intended the exhaustion requirement to apply to all types of prisoner claims. There is no reason to believe that Congress intended to exempt the plaintiff's particular type of case from the general exhaustion requirement.

For all of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals, and remand this case to that Court with directions to affirm the District Court's dismissal.

Respectfully submitted,
Petitioners

*RICHARD BLUMENTHAL
ATTORNEY GENERAL



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No. 00-853

In The
Supreme Court Of The United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition For Certiorari Filed: November 22, 2000
Certiorari Granted: June 4, 2001

79 pp

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RELEVANT DOCKET ENTRIES:

U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT
CV No. 3:99CV01091 (AHN)

6/10/99	COMPLAINT
6/10/99	APPEARANCE of Attorney for Ronald Nussle -- Norman A. Pattis
6/10/99	SUMMONS (ES) issued for Willette, Porter
6/28/99	SUMMONS Returned Executed on 6/16/99 as to Porter, individually
7/14/99	APPEARANCE of Attorney for Porter -- Robert Bishop Fiske III
8/23/99	MOTION by Porter to Dismiss
8/23/99	MEMORANDUM by Porter in support of Motion to Dismiss
8/24/99	APPEARANCE of Attorney for C.O. Willette in his official capacity only -- Robert Bishop Fiske III
9/8/99	MEMORANDUM by Ronald Nussle in opposition to Motion to Dismiss by Porter
9/15/99	MOTION by Ronald Nussle for Entry of Default as to Willette
9/16/00	REPLY by Porter to response to Motion to Dismiss by Porter

11/9/99	Motion hearing held re: Motion to Dismiss by Porter
11/15/99	ENDORSEMENT denying motion for Entry of Default as to Willette (signed by Judge Alan H. Nevas)
11/22/99	RULING granting Motion to Dismiss (signed by Judge Alan H. Nevas)
11/23/99	JUDGMENT for Willette, Porter against Ronald Nussle (signed by Mag. Judge Joan G. Margolis)
11/23/99	Case closed
12/3/99	NOTICE OF APPEAL of judgment order by Ronald Nussle Certified Copy of Appeal and Docket mailed to USCA

RELEVANT DOCKET ENTRIES:
SECOND CIRCUIT COURT OF APPEALS
CASE No. 99-0387

12/28/99	Copy of notice of appeal and district court docket entries on behalf of Appellant Ronald Nussle filed.
12/28/99	Copy of district court ruling dated Nov. 22, 1999 and endorsed by Hon. AHN, DJ, RECEIVED
12/28/99	Copy of district court order dated Nov. 4, 1999 and endorsed by Hon. AHN, DJ, RECEIVED
2/2/00	Appellant Ronald Nussle brief RECEIVED
2/2/00	Appellant Ronald Nussle appendix/ addendum received
2/10/00	Record on appeal index in lieu of record filed
2/10/00	Appellant Ronald Nussle brief FILED with proof of service
2/10/00	Appellant Ronald Nussle appendix filed w/pfs.
3/7/00	A PANEL proposed for argument the week of 5/1/00

3/20/00	Appellee Willette, CO, Appellee Porter, CO brief RECEIVED
3/22/00	Set for argument on 5/3/00 A PANEL
5/3/00	Case heard before CALABRESI, PARKER, STRAUB, C.JJ.
8/24/00	Judgment of the district court is VACATED & REMANDED by published signed opinion filed
8/24/00	Judgment filed
9/19/00	Judgment MANDATE ISSUED
12/4/00	Notice of filing petition for writ of certiorari dated November 29, 2000 filed. Supreme Ct#: 00-0853
6/7/01	Letter dated June 4, 2001 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1751089-1] endorsed on motion form dated 12/4/00 filed (Supreme Court # 00-853). "The Court today entered the following order in the above entitled case: The petition for a writ of certiorari is granted." [William K. Suter, Clerk]

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION
ADMINISTRATIVE DIRECTIVE
Directive Number 9.6

Effective Date - August 12, 1994
Supersedes: INMATE GRIEVANCES - 2/7/94
Title: INMATE GRIEVANCES
Approved by _____
/s/ Larry Meachum 8/11/94

1. Policy. The Department of Correction shall provide a means for inmates to address their grievances. The Inmate Grievance Procedure shall be an administrative remedy which enables the Department to resolve legitimate grievances in a timely manner, to identify individual and systemic problems, and to facilitate the accomplishment of its mission.

2. Authority and Reference.

A. Connecticut General Statutes, Section 18-81.
B. 42 United States Code 1997e.
C. 28 Code of Federal Regulations 40.
D. American Correctional Association, Standards for Adult Community Residential Services, Second Edition, August 1980, Standard 2-2154.
E. American Correctional Association, Standards for Adult Probation and Parole Field Services, Second Edition, March 1981, Standard 2-3163.
F. American Correctional Association, Standards for Adult Correctional Institutions, Third Edition, January 1990, Standard 3-4271.
G. American Correctional Association, Standards for Adult Local Detention Facilities, Third Edition, March 1991, Standard 3-ALDF-3E-11.

H. 1990 Americans with Disabilities Act.

I. Administrative Directives 6.10, Inmate Property; 6.14, Security Risk Group; 9.1; Population Management; 9.2, Inmate Classification; and 9.5, Code of Penal Discipline.

3. Definitions. For the purposes stated herein, the following definitions apply:

A. Abuse. The filing of repetitive grievances addressing the same issue where sufficient time for response has not elapsed or where a valid response has been provided; the filing of an excessive number of grievances; the appeal of a grievance settled in the inmate's favor at a lower level; the filing of harassing grievances; or the intentional filing of emergency grievances which are not emergencies.

B. Emergency Grievance. A grievance processed by expedited methods to resolve an issue which presents: (1) a threat of death or injury; (2) a threat of disruption of facility operations; or (3) a need for prompt disposition because the time is lapsing when meaningful action or decision is possible.

C. Grievance. A written complaint filed by an inmate on the inmate's own behalf in accordance with the procedures stated herein.

D Grievance Coordinator. An employee of the unit designated to coordinate the Inmate Grievance Procedure.

E. Inmate. A person in the custody of the Department of Correction to include those confined in a facility or under community supervision.

F. Unit. An organizational component of the Department, including correctional institutions, correctional centers, detention

centers, DWI units, community service districts and the health services division.

G. Unit Administrator. The person in charge of a unit specified in (F) above.

4. Notice.

A. The Inmate Grievance Procedure shall be published in English and Spanish. Each inmate, direct contact employee and direct contact contractor shall be issued a written summary of the Inmate Grievance Procedure upon initial contact with the Department. An inmate whose primary language is Spanish shall receive a copy written in Spanish. Appropriate provision shall be made for those who do not read, speak or understand English and Spanish. Inmates who are impaired or disabled shall receive assistance as necessary.

B. English and Spanish copies of the Inmate Grievance Procedure shall be available in each inmate library and shall be provided to an inmate upon request.

C. An inmate shall receive oral instruction about the Inmate Grievance Procedure, filing of a grievance and obtaining grievance forms. This instruction shall encourage questions and take place as part of the orientation curriculum, not later than two (2) weeks after admission.

D. Staff shall receive oral instruction regarding the Inmate Grievance procedure during orientation training and upon assignment to a new unit.

E. Upon transfer, an inmate shall be informed of the Inmate Grievance Procedure at the receiving unit.

5. Access. Each inmate in the Department's custody shall have access to the Inmate Grievance Procedure. Special provisions shall be made to

ensure access for the impaired or disabled, illiterate or those with language barriers.

A. Any inmate who needs assistance in using the Inmate Grievance Procedure shall receive assistance upon request.

B. Access shall only be limited as a result of abuse of the Inmate Grievance Procedure in accordance with Section 19 below or failure to comply with the process.

6. Grievable Matters.

A. Grievable. The following matters are grievable:

1. The interpretation and application of policies, rules and procedures of the unit, division and Department.
2. The existence or substance of policies, rules and procedures of the unit, division and Department in accordance with Section 13 below.
3. Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein.
4. Formal or informal reprisal for use of or participation in the Inmate Grievance Procedure.
5. Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans with Disabilities Act, except as noted herein.
6. Property loss or damage.

B. Non-Grievable. The following matters are not grievable:

1. State and federal laws and regulations.
2. State and federal court decisions.
3. Actions pursuant to the Code of Penal Discipline, which are appealable through the disciplinary procedure provided in Administrative Directive 9.5., Code of Penal Discipline.
4. Classification decisions, which are appealable through the classification procedure provided in Administrative Directive 9.2, Inmate Classification.
5. The individual designation of an inmate as a Security Risk Group Member or a Security Risk Group Safety Threat Member in accordance with Administrative Directive 6.14, Security Risk Groups.
6. Health Services diagnosis or treatment decisions which are appealable through the Health Services appeal process.
7. Matters beyond the control of the Department, including parole decision.

7. Disposition and Remedy. Grievances shall either be rejected, denied, upheld or disposed by mutual agreement. Grievances that are upheld shall be given an appropriate and meaningful remedy. Such remedies may include, but not be limited to:

A. Corrective action to rectify the matter being grieved.

B. Changes in written policy and procedures or in interpretation or application of written policies and procedures.

C. Enforcement of existing policy and procedure.

D. Development of policies and procedures pertaining to the grievance.

8. Administrative Provision. Each Unit Administrator shall establish unit directives consistent with the Inmate Grievance Procedure and the type of unit, which shall include at a minimum:

A. The designation of a staff person, to be known as the Grievance Coordinator, whose scope of authority and responsibility shall be defined by the Unit Administrator.
B. Notification procedures to inmates of the name of the Grievance Coordinator.
C. Provision for adequate numbers of collection boxes at various unit locations for the deposit of grievances. Units shall provide locked boxes for depositing grievances.
D. Procedures for the regular and timely collection and appropriate logging of grievances.
E. Procedures for the prompt handling of all emergency grievances.
F. Procedures to assure that no employee or inmate shall participate in the resolution of a grievance in which the employee or inmate is allegedly involved.
G. Procedures to provide notice of and access to the Inmate Grievance Procedure for all inmates including the impaired, disabled, illiterate and those with language barriers.

9. Informal Resolution. An inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with staff able to resolve the matter or utilization of the Inmate Request System. Access to the Inmate Request System shall be through the use of the Inmate Request Form, Attachment B. A clear statement of the problem and action requested should be written by the inmate and sent to the

appropriate unit Department Head or employee. Inmate Request Forms shall be available in all units. Response to the inmate shall be made within 15 calendar days from receipt of the request.

10. Filing a Grievance. An inmate shall attempt to resolve a problem through the Inmate Request System prior to filing a grievance. The inmate shall attach the Inmate Request Form CN 9602, Attachment B, containing the appropriate staff member's response, to the Inmate Grievance Form which requirement may be waived for an emergency grievance. If the inmate was unable to obtain a blank Inmate Request Form, did not receive a timely response to the Inmate Request, or for a similar valid reason, the inmate shall include an explanation as to why the Inmate Request Form is not attached. A grievance may be rejected for failure to attempt informal resolution. A grievance shall be filed in accordance with the following provisions:

A. A grievance must be filed, in writing, on the Inmate Grievance Form CN 9601, Attachment A. Grievance forms shall be readily accessible to inmates.
B. The grievance must be filed by an inmate who is personally affected by the grievance subject and shall not be filed by one inmate on behalf of another.
C. Each grievable matter shall be submitted on a separate Inmate Grievance Form.
D. The grievance and the action requested shall be stated simply and coherently.
E. The length of the grievance shall be restricted to the space available on the fact of the grievance form and one (1) additional 8 1/2 x 11 inch page.
F. The grievance shall be free of obscene or vulgar language or content.
G. The grievance must be filed within 30 days of the occurrence or discovery of the cause of the grievance.

H. A repetitive grievance may not be filed by the same inmate when a final response has been provided and there has been no change in any circumstances that would affect the response; or when the initial grievance is stall in process.

The Inmate Grievance Procedure is an administrative remedy. Inmates contemplating litigation against the Department may be required by the courts to have exhausted this remedy before a suit may be filed.

11. Rejection of Grievance. Any grievance which does not meet the criteria specified in Section 6(A) or the procedural requirements of Section 10 of the Inmate Grievance Procedure may be rejected. Any grievance rejected at any level of the Inmate Grievance Procedure may be appealed to the next level. A grievance which does not comply with the procedures in the Inmate Grievance Procedure shall be returned to the grievant stating that the grievance is not in compliance and citing the specific procedural errors. Any grievance not in compliance with Section 10(G) cannot be corrected.

12. Appeals. A response to a grievance may be appealed to the next level as provided for in Sections 16 and 17. An appeal should be deposited in the Grievance Box or sent to the Grievance Coordinator.

With the consent of the grievant, a reviewer may extend the time limit for a response up to 15 days using the Request for Time Extension Form, CN 9603. A grievant may request a time extension of up to 15 days to file an appeal by sending a written Inmate Request Form to the Grievance Coordinator. A request by the grievant may be granted at the discretion of the reviewer to whom the appeal is to be sent.

13. Appropriate Review. A grievance about a matter that is beyond the authority of lower level(s) of review may be sent by the lower level reviewer directly to the appropriate level of review. In such case the time limit(s) of the lower level(s) shall be combined with the time limit of the appropriate review level and the grievant shall be notified of the review process and of the time frame for response. If the grievance is upheld, the time necessary to implement the change(s) may exceed the time limit for review.

14. Medical Grievances. All health care related grievances shall be placed in a box designated for health services grievances and shall be processed by the designated Health Services Grievance Coordinator.

15. Level 1 Review. The Level 1 review shall be made by the Facility Administrator, Community Services Unit Administrator or ranking facility Health Services administrator/supervisor, as appropriate. The grievance shall be reviewed for compliance with the Inmate Grievance Procedure and investigated if the grievance is accepted. The response shall be in writing within 30 calendar days and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. The appropriate administrator shall notify the inmate of the Level 1 disposition and shall include directions for appealing to Level 2.

16. Level 2 Review. An inmate may appeal a Level 1 action to Level 2 within five (5) calendar days of receipt of the decision. The Level 2 review shall be made by the Director of the Region, Director of Community Services or Regional Health Services Administrator, as appropriate. If a timely response to a Level 1 grievance is not received, an inmate may appeal to Level 2, one (1) day after the authorized time limit expires. The response shall be

in writing within 25 calendar days and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. Level 2 shall be the final level of appeal for all grievances except as provided in Section 17 below.

17. Level 3 Review. Level 3 review is restricted to a grievance which challenges Department level policy; appeals for an emergency grievance which cannot be acted upon at a subordinate level; appeals which challenge the integrity of the grievance procedure; appeals for which a timely response to a Level 2 grievance is not received; and appeals of a grievance rejected at Level 2. If a timely response to a Level 2 grievance is not received an inmate may appeal to Level 3 one (1) day after the authorized time limit expires. An appeal to Level 3 must be submitted within five (5) calendar days of receipt of a Level 2 decision. The Level 3 review shall be made by the Commissioner. The response shall be in writing, within 25 days, and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. Level 3 shall be the final level of appeal for all grievances.

18. Emergency Grievances.

A. Identification. An inmate filing an emergency grievance must plainly mark the grievance as "Emergency".

B. Expedited Process. Each Unit Administrator shall develop unit directives for handling emergency grievances, including procedures for assessing the emergency and expediting resolution, or forwarding the grievance without delay to the decision-maker who can resolve the matter.

C. Time Limits. An emergency grievance that requires action within the unit shall receive a

response within eight (8) hours followed by a written response within three (3) business days. An emergency grievance that requires substantive response beyond the unit or that is appealed to Level 2 or Level 3 shall receive a response in two (2) business days and a written response in five (5) business days. An emergency grievance that will be mooted by the passage of time specified for emergency grievances shall normally receive a verbal or other response prior to that time.

D. Records. Following notification of the Unit Administrator, the grievance shall be recorded in accordance with the provisions for other grievances except it shall be denoted as an emergency.

E. Rejection. If a grievance submitted as an emergency is ruled at any level not to be an emergency, it shall be returned to the grievant stating that the grievance is not an emergency and the reasons why. The response shall indicate that the grievance may be resubmitted as a regular grievance. No emergency grievance shall be rejected solely for failure to follow the procedures in the Inmate Grievance Procedure and any unit directives.

19. Abuse. Abuse of the Inmate Grievance Procedure shall be determined by the Unit Administrator on a case by case basis. A determination of abuse and any resulting limitation may be appealed to Level 2. An inmate who files five (5) or more grievances in a week or 20 or more in any 180 day calendar period may be determined to be abusing the Inmate Grievance Procedure. An inmate may be limited to not more than 10 active grievances at a time not including any emergency grievance or grievance relating to the inmate's property as specified in Administrative Directive 6.10, Inmate Property.

A. A determination of abuse shall result in a limitation on the grievance filing process or on a particular subject. The Unit Administrator shall establish the length of limitation commensurate with the degree of abuse. The length of limitation may be for up to six (6) months and may be increased for second and subsequent abuse in increments not to exceed six (6) months. Inmates under limitation for abuse of the Inmate Grievance Procedure shall be allowed to file emergency grievances. Abuse of the emergency Inmate Grievance Procedure may result in limitation of the use of the emergency Grievance Procedure as well.

B. A limitation of access shall be communicated to the receiving units upon transfer, and may be reviewed by the receiving Unit Administrator.

C. Notice of limitation shall be made in writing to the inmate.

20. Records.

A. Description.

1. Grievance File. A grievance file shall be maintained at each level for each grievance. The grievance file shall include a copy of the grievance, each response, and any supporting documents submitted in support of the grievance, presented during investigation, or relied upon in the decision.

2. Grievance Log. The Grievance Log CN 9604, Attachment D, shall be maintained at each level and shall include the name and number of the grievant, the dates of initial receipt and of the response at that level, a brief description of the problem and the disposition.

B. General Requirements.

1. Each unit shall use the grievance log format and the Inmate Grievance Form.
2. The grievance file and the grievance log shall be systematically maintained by the Grievance Coordinator.
3. Each grievance log shall be retained as the official record and for data collection purposes.

C. Retention. A copy of each completed grievance shall be maintained at the unit for a minimum of three (3) years following final disposition of the grievance.

D. Restriction. No copy of a grievance or adverse reference to any grievance shall be placed in an inmate's Master file.

E. Confidentiality. The confidentiality of the contents of the grievance file, the grievance log, and any record of an inmate's participation in any grievance proceeding shall be maintained in accordance with the existing state statutes and regulations. All files shall be maintained in a locked cabinet not accessible to any person other than the Grievance Coordinator or Level 1 Reviewer. Grievance Coordinators involved in the disposition of a grievance shall have access to records and information essential to the resolution of the grievance. This section shall not be cause for immunity from disciplinary action based on statements made in a grievance.

21. Reprisal Against Staff. No staff member who participates in the resolution of a grievance shall be affected negatively for participation in the solution of a grievance.

22. Reprisal Against Inmates. No inmate shall suffer negative consequences such as denial or limitation of access to any privilege, service or program offered by the unit either formally or informally for good faith use or participation in the Inmate Grievance Procedure.

23. Monitoring and Evaluation. The Unit Administrator shall conduct an evaluation of the Inmate Grievance Procedure in January of each year. Inmates and employees shall be afforded an advisory role in the evaluation which shall include a review of both the effectiveness and credibility of the Inmate Grievance Procedure and recommendations for revision. An annual report shall be presented to the Commissioner by March 1 of each year. The report shall include the findings and recommendations of the evaluation process, statistical data regarding the number and type of grievances, types of dispositions and level of disposition, sample responses from each level, remedies granted, and evidence of compliance with time limits at each level of decision.

24. Exceptions. Any exception to the procedures in this Administrative Directive shall require prior written approval from the Commissioner.

42 U.S.C. § 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) **Dismissal.**

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) **Attorney's Fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) **Limitation on recovery.** No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) **Hearings.**

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) **Waiver of reply.**

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) **"Prisoner" defined**. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

18 USCS § 3626 (2001)

§ 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.

(1) Prospective relief.

(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.

The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that

prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.

(1) In general.

(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.

(A) If the court determines that the appointment of a special master is necessary, the court shall request that

the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal. Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation. The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment. In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties. A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions. As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the

consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

HISTORY: (Added Sept. 13, 1994, P.L. 103-322, Title II, Subtitle D, § 20409(a), 108 Stat. 1827; April 26, 1996, P.L. 104-134, Title I [Title VIII, § 802(a)], 110 Stat. 1321-66; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Nov. 26, 1997, P.L. 105-119, Title I, § 123(a), 111 Stat. 2470.)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of

the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary--

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any

other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(5) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken

pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(6), (7) [Redesignated]

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USCS §§ 631 et seq.] shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.

(1) In general. United States magistrate judge serving under this chapter [28 USCS §§ 631 et seq.] shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court.

This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court. Upon the commission of any such act--

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders. The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations

promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 917; Oct. 17, 1968, P.L. 90-578, Title I, § 101, 82 Stat. 1112; Mar. 1, 1972, P.L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, P.L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, P.L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, P.L. 96-82, § 2, 93 Stat. 643; Oct. 12, 1984, P.L. 98-473, Title II, Ch I, § 208, 98 Stat. 1986; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(29)(B), 98 Stat. 3359; Nov. 14, 1986, P.L. 99-651, Title II, § 201(a)(2), 100 Stat. 3647.) (As amended Nov. 15, 1988, P.L. 100-659, § 4(c), 102 Stat. 3918; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle H, § 7322, 102 Stat. 4467; Nov. 19, 1988, P.L. 100-702, Title IV, § 404(b)(1), Title X, § 1014, 102 Stat. 4651, 4669 Dec. 1, 1990, P.L. 101-650, Title III, § 308(a), 104 Stat. 5112; Oct. 19, 1996, P.L. 104-317, Title II, §§ 201, 202(b), 207, 110 Stat. 3848, 3849, 3850; Nov.13, 2000, P.L. 106-518, §§ 202, 203(b), 114 Stat. 2412, 2414.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	3:99CV01091 (AHN)
Plaintiff,	:	
	:	
v.	:	
	:	
C.O. WILLETTE,	:	
C.O. PORTER,	:	
Defendants.	:	JUNE 10, 1999

COMPLAINT

1. This is a lawsuit arising out of the lawless acts of violence by the defendants, corrections officers at the Cheshire Correctional Institution against the plaintiff. The plaintiff claims abridgement of his rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and his right to substantive due process arising under the Fourteenth Amendment to the United States Constitution. He also claims violation of his right to be free from assault and battery under Connecticut law as a pendent state-law claim.

2. Jurisdiction of this court is invoked under provisions of §§ 1331, 1343(3) and 1367(a) of Title 28 and §§ 1983 and 1988 of Title 42 of the United States Code.

3. The plaintiff, RONALD NUSSLE, was at all times relevant to this Complaint, and remains, an inmate in the care and custody of the State of Connecticut Department of Correction. He was at all times relevant to this Complaint, an inmate at the Cheshire Correctional Institution.

4. Defendant Corrections Officer WILLETTE was, at all times relevant to this Complaint, a corrections

officer employed by the State of Connecticut at the Cheshire Correctional Institution. He is sued in his individual capacity only.

5. Defendant Corrections Officer PORTER was, at all times relevant to this Complaint, a corrections officer employed by the State of Connecticut at the Cheshire Correctional Institution. He is sued in his individual capacity only.

6. At all times relevant to this Complaint, the defendants each of them were acting under color of law, that is, under color of the Constitution, statutes, laws, regulations, customs and usages of the State of Connecticut.

7. At all times relevant to this Complaint, the defendants were acting jointly and in concert with each other. Each defendant had the duty and the opportunity to protect the defendant but each defendant failed and refused to perform such duty, thus proximately causing the plaintiff's injuries.

8. On or about June 15, 1996, the plaintiff was an inmate at the Cheshire Correctional Institution.

9. Beginning upon the plaintiff's arrival at the Cheshire Correctional Institution in May 1996, he was made the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers because the plaintiff was perceived as a friend of Gov. John G. Rowland. He was told: "Tell your friend Rowland to give us a raise."

10. On or about June 15, 1996, defendants Willette and Porter together with unknown Corrections officers, entered the plaintiff's cell and told him to leave the cell.

11. The defendants placed him against a wall and struck him with their hands, kneed him in the back, pulled his hair. The plaintiff was beaten so badly he lost control of his bowels. All of these acts of violence were done without provocation and without justification in that the plaintiff did not disobey an order or otherwise resist the defendants in the lawful performance of their duties.

12. The plaintiff was told that if he reported this beating the guards would kill him.

13. At a direct and proximate result of the beating described above, the plaintiff suffers, and continues to suffer, numbness in his right leg. He also suffered bruises, lacerations, physical pain and emotional distress.

14. The acts of each and every defendant named in this suit were intentional, reckless or in wilful disregard of the plaintiff's clearly established Constitutional rights.

15. The acts of each and every defendant named in this suit were sadistic and were motivated by a desire to cause physical pain and terror.

16. In the manner described herein, the defendants deprived the plaintiff to his rights to freedom from cruel and unusual punishment. The defendants also violated the plaintiff's right to substantive due process.

WHEREFORE, the plaintiff claims judgment against the defendants and each of them, jointly and severally as follow:

A. Compensatory damages in an amount this Court shall consider to be just, reasonable and fair;

B. Punitive damages in an amount this Court shall consider to be just reasonable and fair;

C. Attorney fees and the costs of this action;

D. Such other relief as this Court shall deem fair and equitable.

PLAINTIFF'S JURY CLAIM

The plaintiff claims a trial by jury for all issues raised in this complaint.

THE PLAINTIFF
By: _____
/s/NORMAN A. PATTIS
Williams, Polan & Pattis, LLC
51 Elm St., Suite 409
New Haven, CT 06510
Fed. Bar No. 13120
(203) 562-9931

UNITED STATES DISTRICT COURT

STATE OF CONNECTICUT

RONALD NUSSLE,	:	CIVIL NO.
Plaintiff,	:	3:99CV01091(AHN)
	:	
vs.	:	
	:	
CORRECTIONAL OFFICERS		
WILLETTE	:	
AND PORTER,	:	
Defendants.	:	AUGUST 20, 1999

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, Defendant Correctional Officer Porter[1/], respectfully requests this Court to dismiss this lawsuit against him, in its entirety, for the following reasons:

A. The plaintiff has failed to state a claim upon which relief can be granted, because he has failed to exhaust his administrative remedies.

WHEREFORE, Defendant Porter respectfully requests that his Motion to Dismiss be granted in its entirety.

1/ Co-defendant Correctional Officer Willette is not represented by the undersigned counsel for Defendant Porter, and thus his interests are not represented in this Motion.

DEFENDANT
Correctional Officer Porter

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Robert B. Fiske, III
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105
Tel: (860)808-5450
Fed. No. ct17831

CERTIFICATION

I hereby certify that a copy hereof was mailed this,

the 20th day of August, 1999 to:

Mr. Norm Pattis
Williams, Polan & Pattis
51 Elm Street, Suite 409
New Haven, CT 06510

/s/ Robert B. Fiske, III
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE :

v. : 3:99CV1091(AHN)

C.O. WILLETTE, ET AL :

RULING ON MOTION TO DISMISS

The plaintiff, Ronald Nussle ("Nussle"), brings this action against the defendants, correctional officer Willette ("Willette") and correctional officer Porter ("Porter"), alleging violations of 42 U.S.C. § 1983,[2/] as well as a state law claim for assault and battery.

2/ Specifically, Nussle alleges violation of his substantive due process rights under the Fourteenth Amendment. He also alleges the use of excessive force by the defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Nussle's substantive due process claim is based on the same facts as his excessive force claim. However, in *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986), the United States Supreme Court recognized that, while the same facts may state a claim under the Eighth Amendment for cruel and unusual punishment as well as a substantive due process claim under the Fourteenth Amendment, after conviction, "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection...in cases...where the deliberate use of force is challenged as excessive and unjustified." *Whitley*, 475 U.S. at 327; *see also Meriwether v.*

Now pending before the Court is Porter's motion to dismiss Nussle's entire complaint. For the reasons that follow, the motion [doc. #8] is GRANTED.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 236). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

FACTS

The plaintiff, an inmate in the custody of the State of Connecticut Department of Correction at Cheshire Correctional Institute ("Cheshire"), both now and at all times relevant to this lawsuit, alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation. (See Pl.'s Compl. ¶¶ 7, 9.) Specifically, Nussle alleges that on June 15, 1996, the defendants, together with other unknown correctional officers, entered his cell, placed him against the wall and, without provocation or justification, proceeded to violently beat him. (*See id.* ¶¶ 10, 11.) Nussle further alleges that the defendants told him he would be killed if he reported the incident. (*See id.* ¶ 12.) Nussle contends that as a result of the alleged assault he suffers from physical and emotional distress. (*See id.* ¶ 13.) He is seeking compensatory and punitive damages as well as attorney's fees and costs of this action.

DISCUSSION

Porter maintains that 42 U.S.C. § 1997e(a) of the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), precludes an inmate from bringing a § 1983 lawsuit in federal court if the inmate has failed to exhaust administrative remedies within the Department of Corrections ("DOC"). Porter asserts that this action is governed by the PLRA because Nussle's claim of excessive force involves prison conditions. He contends that Nussle's failure to file a formal complaint under the DOC's inmate grievance procedures[3/] or to try to

Thus, "any protection [the Fourteenth Amendment] affords convicted prisoners against excessive force is at best redundant of that provided by the Eighth Amendment." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1870-71 n. 10 (1989) (explaining that actions which are protected under specific constitutional provisions should be analyzed under those provisions and not under "the more generalized [provisions] of substantive due process"); *see also Whitley*, 475 U.S. at 327 (noting that in the context of excessive force claims, the Due Process Clause provides prisoners no greater protection than the Eighth Amendment). Accordingly, in this case, Nussle's claim will be analyzed solely under the Eighth Amendment, and his claim under the Fourteenth Amendment is dismissed.

3/ Specifically, Porter maintains that Nussle was required to follow the procedures set forth in the DOC's Administrative Directive 9.6. Subsection 6

informally resolve it under the DOC procedures[4/] renders his complaint premature and that dismissal is thus required.

In response, Nussle asserts that the exhaustion requirement of the PLRA does not apply in this case because he is not alleging that the conditions of his confinement are unlawful, but is only alleging a violation of his Eighth and Fourteenth Amendment rights. He further contends that exhaustion in this case would be futile because the DOC grievance procedures do not address excessive force claims made by prisoners against officers and because he is seeking compensatory and punitive damages, which cannot be recovered in a DOC grievance hearing.

I. PLRA

42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner...until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The intended purpose of the PLRA was to limit frivolous prisoner lawsuits, which had comprised more than twenty-five percent of all cases filed in the United States District Courts. See 141 Cong. Rec. s7498-01, *7526 (daily ed. May 25, 1995) (statement of Senator Kyl).

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of Administrative Directive 9.6 covers matters that are grievable by inmates. It provides that "[a]ny other matter relating to . . . conditions of care or supervision" is grievable through the DOC's administrative procedures (See Administrative Directive 9.6, subsection 9.6.A.5.).

4/ Subsection 9 of Administrative Directive 9.6 states that "[a]n inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with the staff able to resolve the matter...."

Although the PLRA requires exhaustion, there is no consensus among the circuits as to the circumstances when exhaustion is required and when it is not required. In fact, the district courts in the Second Circuit are not in agreement on this issue. Specifically, there is a difference of opinion on the two issues that are implicated here: (1) whether the exhaustion requirement applies where the relief requested, i.e., money damages, is not available through the administrative process; and (2) whether cases alleging the use of excessive force are actions "with respect to prison conditions" as that phrase is used in 42 U.S.C. § 1997e(a).

A. Administrative Remedies

Courts are not in agreement as to whether § 1997e(a) applies where prisoners seek money damages and such relief cannot be obtained in the administrative process. *Compare Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (discussing the split among circuits on the issue and holding that the inmate was not required to exhaust administrative remedies where remedy sought was not available in prison's administrative system); and *Garret v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (holding that § 1997e(a) applies only to the extent that the administrative process provides the relief requested); *with Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999) (holding that neither assertion that exhaustion would be futile nor alleged unavailability of administrative remedy negated exhaustion requirement).

The cases which have held that exhaustion is not required reason that an administrative process that does not provide the particular form of relief sought, i.e, money damages, does not provide an "available remedy" within the meaning of § 1997e(a). See *e.g., Perez*, 182 F.3d at 535. In such a case, exhaustion is found to be futile and an unnecessary roadblock to a prisoner's federal claim. *See id.*

The cases which find that exhaustion is required regardless of whether the relief is available focus on the fact that Congress changed the language of § 1997e(a) when the Act was amended in 1996. Prior to the amendment, the Act

provided that prisoners were required to exhaust "plain, speedy and effective" administrative remedies. See *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 892-94 (S.D.N.Y. 1998). Now, § 1997e(a) provides for exhaustion of "available" remedies. See § 1997e(a). Accordingly, this line of cases construe the amendment as requiring exhaustion without regard to whether the remedy is "effective." *See Beeson*, 28 F. Supp.2d at 893. To hold otherwise would essentially reintroduce the requirement that the remedy be "effective," despite the fact that Congress deleted it. *See Vasquez v. Artuz*, No. 97cv8427(JP), 1999 WL 440631 (S.D.N.Y. June 28, 1999). Moreover, because prisoners almost always seek money damages, crafting such an exception would effectively remove the exhaustion requirement entirely.[5/] *See id.* at *6. The Court finds this reasoning persuasive.

In addition, if exhaustion were required only in cases where the relief sought was available, there would be little, if any, effect on the flow of meritless prisoner cases filed in federal court in contravention of Congressional intent. *See* 141 Cong. Rec. s7525 (statement of Sen. Kyl). Moreover, exempting cases that seek money damages from the exhaustion requirement would involve federal courts in the tedious and intrusive process of "evaluat[ing] each cause of action and each type of relief sought in each prisoner's complaint [in order to] determine whether the [relevant administrative system] can grant adequate relief[;]" a result Congress plainly meant to avoid. *See Vasquez*, 1999 WL 440631, *6 (quoting *Alexender v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998)) (internal quotations omitted). Consequently, mandatory exhaustion will encourage prisoners to comply with administrative procedures by forcing them to report their complaints to prison officials promptly or risk forfeiture of such claims. *See Beeson*, 28 F.Supp.2d at 895. "In contrast, exempting money damages claims from the [exhaustion] requirement [of § 1997e(a)] would undermine whatever incentive inmates have to report their claims promptly because they could bring an action in federal court any time within the applicable statute of

5/ In fact, at oral argument, counsel for Nussle conceded this point.

limitations." *Id.* For these reasons, the fact that prisoners cannot recover money damages in an administrative grievance before the DOC is not a sufficient basis to avoid § 1997e(a)'s exhaustion requirement.

B. Excessive Force Claims

Court have also differed about whether cases alleging excessive force are actions "with respect to prison conditions" as that phrase is used in § 1997e(a). *Compare Carter v. Kiernan*, No. 98cv2664, 1999 WL 14014, at *2-4 (S.D.N.Y. Jan. 14, 1999) (holding that Eighth Amendment excessive force claims are not subject to PLRA exhaustion requirement); and *Baskerville v. Goord*, No. 97cv6413, 1998 WL 778396, at *3-6 (S.D.N.Y. Nov. 5, 1998) (holding that exhaustion requirement does not apply to Eighth Amendment excessive force claims); and *White v. Fauver*, 19 F. Supp.2d 305, 312-15 (D.N.J. 1998) (holding the same); with *Beeson v. Fishkill Correctional Facility*, 28 F. Supp.2d 884, 887-96 (S.D.N.Y. 1998) (holding that Eighth Amendment excessive force claims are subject to exhaustion requirement); and *Moore v. Smith*, 18 F.Supp.2d 1360, 1362-63 (N.D. Ga. 1998) (concluding the same).

Although the issue was recently before the Second Circuit, that court has yet to decide it. See *Liner v. Goorde*, No. 98-2925, 1999 WL 734693 (2d Cir. Sept. 22, 1999). In *Liner*, a prisoner brought a § 1983 excessive force claim which the district court dismissed sua sponte before the defendants were served. The court declined to resolve this complex legal issue without the benefit of a more complete record. *See id.*

Nonetheless, even without guidance from the Second Circuit on this complex issue, the Court concludes that the exhaustion requirement applies to cases alleging excessive force. The express language of the PLRA provides for exhaustion of administrative remedies before a prisoner may bring a federal action relating to "prison conditions." *See Beeson*, 28 F.Supp.2d at 887-92. The use of excessive force by correctional officers falls into the category of "prison conditions."

Moreover, there is no support in the legislative history of the PLRA that, as Nussle argues, Congress intended to exempt excessive force claims from the exhaustion requirement. See 141 Cong. Rec. s7525 (statement of Sen. Kyl) (explaining the serious problem regarding the high number of meritless prisoner claims brought in federal court). To the contrary, the legislative history indicates that Congress intended to include excessive force claims within the coverage of § 1997e(a)'s exhaustion requirement. *See Beeson*, 28 F.Supp.2d at 892.

Specifically, there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation. *See Beeson*, 28 F.Supp.2d at 892. Creating an exception for excessive force claims would circumvent the Congressional purpose of weeding out frivolous claims before they are filed in federal court. See id.; *Navarrete v. Metro. Detention Ctr.*, No. 97cv4071, 1999 WL 294875 (E.D.N.Y. March 19, 1999). Thus, efficiency and judicial economy favor exhaustion of all prisoner claims prior to a federal lawsuit being brought.

For these reasons, and in the absence of binding precedent to the contrary, the Court finds that prisoner claims of excessive force under the Eighth Amendment are claims "with respect to prison conditions" and, thus, are subject to § 1997e(a)'s exhaustion requirement. Accordingly, because Nussle has failed to exhaust his remedies before the DOC, the complaint is dismissed.

CONCLUSION

For the reasons stated above, the defendant's Motion to Dismiss (doc. # 8] is GRANTED.

SO ORDERED this 22nd day of November, 1999 at Bridgeport, Connecticut.

/s/Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	3:99CV01091 (AHN)
Plaintiff,	:	
	:	
v.	:	
	:	
C.O. WILLETTE, and	:	
C.O. PORTER	:	
Defendants.	:	

JUDGMENT

This matter came on before the Honorable Alan H. Nevas, Senior United States District Judge, as a result of defendant Correction Officer Porter's motion to dismiss.

This Court has reviewed all of the papers filed in conjunction with the motion and on November 22, 1999 entered a Ruling on Motion to Dismiss granting the motion and dismissing the plaintiff's complaint for failure to exhaust his remedies before the Department of Corrections.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 23rd day of November, 1999.

KEVIN F. ROWE, Clerk

By:_____
/s/ Deputy-in-Charge

Entered on Docket 11/29/99

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	CIVIL ACTION NO.:
Plaintiff,	:	3:99CV01091 (AHN)
	:	
v.	:	
	:	
C.O. WILLETTE, and	:	
C.O. PORTER,	:	
Defendants.	:	DECEMBER 1, 1999

PLAINTIFF'S NOTICE OF APPEAL

The plaintiff hereby provides notice of his intent to appeal the District Court's Motion to Dismiss filed on November 22, 1999.

THE PLAINTIFF

BY:_____
/S/ Norman A. Pattis
Federal Bar No. ct13120
51 Elm Street, Suite 409
New Haven, CT 06510
(203) 562-9931
Plaintiff's Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 3, 2000 Decided: August 24, 2000)

Docket No. 99-0387

RONALD NUSSLE,

Plaintiff-Appellant,

-v.-

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,

Defendants-Appellees.

Before: CALABRESI, PARKER, and STRAUB, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) granting the defendant's motion to dismiss the plaintiff's § 1983 complaint for failure to exhaust administrative remedies. The District Court held that the Prison Litigation Reform Act of 1995 ("PLRA") required the plaintiff to exhaust administrative remedies before bringing his § 1983 claim to court. We reverse the District Court's judgment, holding that the PLRA exhaustion requirement does not encompass claims for assault or excessive use of physical force under the Eighth Amendment.

Vacated and remanded.

NORMAN A. PATTIS, Williams and Pattis, LLC, New Haven, CT, *for Plaintiff-Appellant*.

GREGORY T. D'AURIA, Assistant Attorney General, State of Connecticut (Richard Blumenthal, Attorney General, and Robert B. Fiske, III, Assistant Attorney General, on the brief), for Defendants-Appellees.

STRAUB, *Circuit Judge*:

Appellant Ronald Nussle appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*), dismissing his complaint for failure to exhaust administrative remedies. Nussle's appeal presents an issue of first impression in this Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment. Because we conclude that § 1997e(a) does not apply to allegations of particular instances of excessive

force or assault by prison employees, we vacate the District Court's judgment and remand for reinstatement of Nussle's complaint.

BACKGROUND

This action arises from Nussle's claim that he was wrongfully assaulted by corrections officers acting under color of law at the Cheshire Correctional Institute ("CCI") in Cheshire, Connecticut. Nussle has been an inmate at CCI, under custody of the Connecticut Department of Corrections ("DOC"), since May 1996. He alleges that from the time of his arrival at CCI, he was the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers on account of his perceived friendship with the Governor of the State of Connecticut. Nussle complains of injuries arising from one particular violent incident during that period. According to Nussle, on or about June 15, 1996, defendants Willette [1] and Porter entered his cell, instructed him to leave the cell, and proceeded to beat him without apparent provocation or justification of any sort. The officers allegedly "placed [Nussle] against a wall and struck him with their hands, kneed him in the back, [and] pulled his hair. The plaintiff was beaten so badly he lost control of his bowels." Nussle claims that these actions were motivated by a sadistic intent to cause physical pain, and that the officers threatened to kill him if he reported the beating. As a result of the incident, Nussle asserts that he suffered bruises, lacerations, physical pain (including ongoing numbness in his right leg), and emotional distress.

On June 10, 1999, Nussle commenced this action against corrections officers Willette and Porter in their individual capacities. His claim under 42 U.S.C. § 1983 alleges that the officers violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and his Fourteenth Amendment right to substantive due process. [2] Nussle also asserted pendent state law claims for assault and battery. In order to remedy his injuries, Nussle's complaint sought compensatory and punitive damages as

well as attorney's fees and the costs of bringing this action. The defendants moved to dismiss Nussle's complaint on the ground that he had failed to exhaust administrative remedies. The District Court agreed and granted the defendants' motion, holding that the exhaustion requirement of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) ("PLRA") (codified at 42 U.S.C. § 1997e(a) (Supp. 2000)), required Nussle first to exhaust DOC's administrative remedies before taking his § 1983 claim to court. This timely appeal followed.

DISCUSSION

We review a grant of a motion to dismiss for lack of exhaustion *de novo*, taking as true all allegations in the complaint, and drawing all reasonable inferences therefrom in favor of the nonmoving party. *See In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). We must "vacate the dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 110 (2d Cir. 1998) (internal quotation marks omitted).

I. Enactment of the PLRA Exhaustion Requirement

As a general matter, exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982); *see also Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998). Statutory purpose and legislative intent support this presumptive rule of non-exhaustion. The "very purpose" of § 1983, the precursor of which first was enacted during Reconstruction as part of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225,

242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *see Patsy*, 457 U.S. at 503.

Nevertheless, exhaustion of state remedies may be required in those limited circumstances in which "Congress has carved out a specific exception to the general rule that exhaustion is not required." *Doe*, 148 F.3d at 78. The inmate exhaustion provision at issue in this case, 42 U.S.C. § 1997e(a), is an exception of this sort. This provision first was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997, 1997a-1997j (1994 & Supp. 2000)), and was intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 actions. *Patsy*, 457 U.S. at 508 (1982) (refusing to require exhaustion for § 1983 claims not covered by the CRIPA exhaustion provision); *see also McCarthy v. Madigan*, 503 U.S. 140, 149 (1992) (declining to extend § 1997e(a)'s exhaustion provision to *Bivens* actions). The pre-PLRA version of § 1997e(a) provided a discretionary mechanism by which courts could (but were not obligated to) require prisoners to exhaust state administrative remedies before asserting claims under § 1983. 3

Section 803(d) of the PLRA added teeth to the § 1997e(a) exhaustion provision, affirmatively *requiring* prisoners to exhaust administrative remedies, whether federal or state, before bringing any federal claims "with respect to prison conditions." 4 The PLRA strengthened the § 1997e(a) exhaustion provision in three relevant respects. First, by its own terms the pre-PLRA exhaustion provision applied only to § 1983 claims, not to actions brought under other federal laws. *See, e.g.*, *McCarthy*, 503 U.S. at 150. The amended provision, by contrast, applies to any federal claim brought "with respect to prison conditions." 42 U.S.C. § 1997e(a). Second, the pre-PLRA provision was not mandatory upon courts. Rather, it simply *authorized* courts to invoke exhaustion, at their discretion, if requiring exhaustion "would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1994) (amended 1996). In so doing, a court was permitted only to "continue" the action for up to 180 days, not to dismiss the action outright. *See McCarthy*,

503 U.S. at 150; *Patsy*, 457 U.S. at 510-11. The PLRA, however, requires exhaustion of available administrative remedies before inmate-plaintiffs may bring their federal claims to court at all. Third, exhaustion under the pre-PLRA version of § 1997e only could be required if two conditions were met: (1) if the available administrative procedures were "plain, speedy, and effective"; and (2) if the Attorney General certified, or the court itself determined, that the prison's grievance provisions substantially complied with minimum acceptable standards set forth by the Attorney General or were "otherwise fair and effective." *See Patsy*, 457 U.S. at 510-11. The PLRA, on the other hand, does not make "effectiveness" of administrative remedies a precondition to the exhaustion requirement.

At the same time that it expanded the scope of CRIPA's exhaustion provision, the PLRA also explicitly limited its applicability only to federal actions that are brought "with respect to prison conditions"-a qualification on the scope of the exhaustion provision not found in the pre-PLRA version of § 1997e(a). Therefore, analysis of whether the amended version of § 1997e(a) applies to excessive force or assault claims must account for the manner in which the PLRA broadened the scope of this provision as well as the manner in which it simultaneously limited that scope. Both aspects of this amendment, in other words, must be presumed to have "real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), so as not to render statutory language superfluous. *See Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *3 (S.D.N.Y. Nov. 5, 1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

We interpret the amended version of § 1997e(a) against the background principles that govern exhaustion of administrative remedies generally, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998), and

in light of the interpretive principle that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the [general rule]." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Patsy*, 457 U.S. at 508 (exhaustion provision in § 1997e(a) is intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 cases); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (narrowly interpreting statutory exception in Copyright Act).

I. Applicability of § 1997e to Excessive Force or Assault Claims

Whether or not assault or excessive force claims are subject to the amended version of the § 1997e(a) exhaustion requirement turns entirely on whether such claims fall within the category of actions "brought with respect to prison conditions" covered by that provision. If particular incidents of assault or the use of excessive force do not constitute "prison conditions" within the meaning of the statutory text, then Nussle's § 1983 claim should not be subject to the exhaustion requirement. Conversely, if claims for particular instances of assault or excessive force *are* properly considered claims "brought with respect to prison conditions," then Nussle must fulfill § 1997e(a)'s requirement that he exhaust "such administrative remedies as are available" 5 before taking his federal claims to court. 42 U.S.C. § 1997e(a). The issue is one of first impression in this Circuit. *See Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (declining to resolve the "complex legal issue[]" of whether § 1997e(a)'s exhaustion requirement encompasses particular claims for excessive force).

Courts have divided over whether excessive force and assault claims are encompassed within this provision. *See id.* (noting split in authority). A number of courts that have analyzed the issue, including the Third and Sixth Circuits, have concluded that § 1997e(a) does encompass such claims. 6 *See Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (excessive force claims are actions "brought with

respect to prison conditions" under § 1997e(a)), *petition for cert. filed*, No. 99-1964 (June 5, 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999); *Cuoco v. United States Bureau of Prisons*, No. 98 Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998). However, a number of courts have held to the contrary. *See Tolliver v. Wilson*, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); *Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000); *Wright v. Dee*, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999); *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999); *Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998); *Royster v. United States*, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999); *see also Peddle v. Sawyer*, 64 F. Supp. 2d 12, 15-16 (D. Conn. 1999) ("prison conditions" does not encompass sexual assault). In light of the text, structure, and legislative history of the PLRA, we agree with those courts that have held that § 1997e(a) does not encompass particular instances of excessive force or assault.

A. *Statutory Text of § 1997e(a)*

In considering the proper scope of §1997e(a), we begin by examining the text of the statute itself, since the language of a statutory provision, if clear and unambiguous on its face, is presumed to bear its plain meaning unless the text suggests an absurd result. *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("In the usual case, if the words of a statute are unambiguous, judicial inquiry should end, and the law is interpreted according to the plain meaning of its words."). When considering plain meaning, we nevertheless must also keep in mind context and the structure of the statute as a whole. *See, e.g., Miller v. French*, 120 S. Ct. 2246, 2248-49 (2000); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (internal quotation marks and citation omitted)); *K Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (assessment of plain meaning must also look to "language and design of the statute as a whole").

The use in § 1997e(a) of the term "prison conditions," however, is scarcely free of ambiguity. Section 1997e(a) itself provides no definition of what constitutes a claim "brought with respect to prison conditions"-and neither does § 1997e(h), the definitional provision of § 1997e, or § 1997, which also defines terms used in § 1997e. The plain meaning of "prison conditions" in § 1997e(a) does not obviously encompass particular instances of excessive force or assault, as the defendants argue here-indeed, it actually suggests the opposite. In the context of this statute, the term "conditions," used in its plural form, denotes "attendant circumstances" or an "existing state of affairs"-as exemplified by such ordinary phrases as "living conditions," "playing conditions," and "adverse weather conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961); *see also Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting). In light of this definition of "conditions," the use of the term "prison conditions" in § 1997e(a) would appear to refer to "circumstances affecting everyone in the area affected by them," rather than "single or momentary matter[s]," such as beatings or assaults, that are directed at particular individuals. 7 *Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting); *see also Carter*, 1999 WL 14014, at *3 ("The ordinary, contemporary, common meaning of the phrase 'prison conditions' refers to such things as medical treatment, food, clothing, and the nature and circumstances of the housing available in prison.").

B. *Relationship between 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g)(2)*

While § 1997e(a) does not expressly define the term "prison conditions," similar language is used and explicitly defined in a different section of the PLRA, 18 U.S.C. § 3626(g)(2). 8 This definition, by its own terms, only applies to "this section"-*i.e.*, 18 U.S.C. § 3626. Nevertheless, the defendants urge that § 1997e(a) should be read *in pari*

materia with 18 U.S.C. § 3626, based on the interpretive canon that language "used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) ("Construing identical language in a single statute *in pari materia* is both traditional and logical."). Other courts have read the "prison conditions" language of § 1997e(a) *in pari materia* with the definition provided in 18 U.S.C. § 3626(g)(2). *See, e.g. Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F. Supp. 2d at 888; *Giannattasio*, 2000 WL 335242, at *11-*12. *But see Carter*, 1999 WL 14014, at *3-*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of "prison conditions" under § 1997e(a)). The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself-indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance. *Compare, e.g., Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court) (excessive force claims are encompassed within the § 3626(g)(2) definition); *and Beeson*, 28 F. Supp. 2d at 888-89 (same), *with Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (excessive force claims do not fall within the definition in 18 U.S.C. § 3626(g)(2) and are therefore outside the scope of § 1997e(a)); *Baskerville*, 1998 WL 778396, at *4-*5 (same).

Section 3626(g)(2) encompasses two categories of civil actions: (1) those brought with respect to "conditions of confinement," and (2) those brought with respect to "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (Supp. 2000). Section 3626(g)(2)'s reference to "conditions of confinement" is "no more apt" to include particular instances of assault or excessive force than the reference to "prison conditions" in § 1997e(a) itself. *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting). To characterize particular instances of assault or the use of excessive force as "conditions of confinement" clearly

departs from normal, everyday use of the phrase, as the Third Circuit concedes and other courts apparently do not urge. *See id.* at 294, 296 n.5 (opinion of the court) (excessive force claims "do not naturally fall into" category of actions "with respect to conditions of confinement"); *id.* at 301 (Noonan, J., concurring and dissenting) (statutory phrase "'conditions of confinement' does not encompass specific batteries").

Instead, those courts requiring exhaustion have, without exception, placed excessive force and assault claims within the second category set forth in § 3626(g)(2), "effects of actions by government officials on the lives of persons confined in prison." *See, e.g., id.* at 294-95 (opinion of the court); *Beeson*, 28 F. Supp. 2d at 888-89 (quoting and following *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998)). In so doing, however, these courts have simply assumed it to be self-evident that such claims fall within the scope of § 3626(g)(2)'s second category-with a typical example being the Third Circuit's broad reading of that phrase to include almost all actions by government officials that "affect the lives of prisoners similarly . . . [by making] their lives worse." *Booth*, 206 F.3d at 295; *see also Beeson*, 28 F. Supp. 2d at 888-89 (concluding, without analysis, that excessive force claims are included within the ambit of § 3626(g)(2)).

We disagree with the notion that particular instances of assault or excessive force self-evidently constitute "effects of actions by government officials on the lives of persons confined in prison" under the second category of § 3626(g)(2), since such awkward language would not, ordinarily, be used to describe such incidents. In his dissent from the Third Circuit's decision in *Booth v. Churner*, Judge Noonan, sitting by designation, vividly argues this point:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken

> or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Booth, 206 F.3d at 302 (Noonan, J., concurring and dissenting); *see Giannattasio*, 2000 WL 335242, at *12 (holding that the use of excessive force does not constitute a "prison condition" in the ordinary sense of the term). The use of "roundabout phraseology," of course, does not necessarily end the inquiry, for Congress certainly "has a right to define one thing to mean something different from what it normally means." *Benjamin v. Jacobson*, 172 F.3d 144, 173 (2d Cir.) (en banc) (Calabresi, J., concurring), *cert. denied*, 120 S. Ct. 72 (1999). Still, the "elephantine way" in which Congress drafted § 3626(g)(2), *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), does signal the need for closer inquiry-for it is hardly certain that the text of the statute includes claims of excessive force or assault, at least not without further explanation. 9 *Cf. Benjamin*, 172 F.3d at 192 n.35 (Calabresi, J., concurring) ("[I]f [a legislature] seems to say that a banana *is* an apple, we should not hesitate to try to figure out what it really meant to say.").

C. *Structure, Purpose, and Legislative History of the PLRA*

Since the text of both 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g) are ambiguous, we turn to the structure and purpose of the statute as a whole, the legislative history of the PLRA, and the broader legal context for interpretive guidance concerning the meaning of "prison conditions" and the relationship between § 1997e(a) and § 3626(g)(2). *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (in addition to statutory language, courts must also look to the "design of the statute as a whole and to its object and policy" to determine the statute's meaning).

Sections 3626(g)(2) and 1997e(a), enacted by §§ 802 and 803 of the PLRA, respectively, advance distinct statutory purposes. While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get

to court, 18 U.S.C. § 3626-codified in an entirely different title of the U.S. Code-is concerned with the different purpose of preventing "courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Baskerville*, 1998 WL 778396, at *4 (internal quotation marks, citations, and footnote omitted); *see also Benjamin*, 172 F.3d at 182 (Calabresi, J., concurring) (noting that by enacting § 3626, "Congress meant to get the federal courts out of the business of running jails").

In this light, the term "government officials" in § 3626(g)(2) is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive physical force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority. *See Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *12 (concluding that the second category in § 3626(g)(2) refers to "acts of supervisory officials, such as the imposition of general rules and policies, that influence how a prison is run . . . [and not] day-to-day interactions between prisoners and corrections officers"); *Baskerville*, 1998 WL 778396, at *4 (interpreting § 3626(g)(2) in light of that section's purpose to conclude that the definition "contemplates actions by prison officials that have broad effects on prison administration"). A similar use of the term "official" in a different part of the same section supports this conclusion. Section 3626(a)(3)(F), concerned with the prerequisites for the issuance of prisoner release orders, confers standing to oppose such release orders upon "[a]ny State or local official" whose "jurisdiction or function includes" the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. *See, e.g.*, *Ruiz v. Estelle*, 161 F.3d 814, 819-21 (5th Cir. 1998) (discussing and interpreting § 3626(a)(3)(F)), *cert. denied*, 526 U.S. 1158 (1999). As in § 3626(g)(2), this usage of the word "official" quite clearly

refers to those officials with administrative or policymaking responsibility.

An examination of cases in which § 3626 directly has been applied also reinforces this conclusion: the types of "government officials" who were defendants or parties to consent decrees in the institutional reform actions brought prior to the enactment of the PLRA routinely were senior policymaking or administrative officials. *See, e.g.*, *Miller v. French*, 120 S. Ct. 2246, 2250-51 (2000) (inmate class action initially brought against Indiana prison officials, including superintendent of correctional facility); *Ruiz v. Johnson*, 178 F.3d 385, 387 (5th Cir. 1999) (inmate class action initially brought against Texas prison officials, including director of Texas Department of Criminal Justice and members of Texas Board of Criminal Justice), *abrogated by French*, 120 S.Ct. 2246; *Benjamin*, 172 F.3d at 149-50 (seven class actions by pretrial detainees initially brought against New York City prison officials, including commissioner of corrections), *cert. denied*, 120 S.Ct. 72 (1999); *Hadix v. Johnson*, 133 F.3d 940, 941 (6th Cir.) (inmate class action initially brought against "various state prison officials" in Michigan), *cert. denied*, 524 U.S. 952 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 652 (1st Cir. 1997) (class action by pretrial detainees initially brought against Massachusetts prison officials, including Suffolk County sheriff and Massachusetts corrections commissioner), *cert. denied*, 524 U.S. 951 (1998); *Gavin v. Branstad*, 122 F.3d 1081, 1083 (8th Cir. 1997) (inmate class action initially brought against "a number of Iowa state officials"), *cert. denied*, 524 U.S. 955 (1998). Moreover, many of the institutional reform actions to which 18 U.S.C. § 3626 is addressed initially were brought as class actions. *See, e.g.*, *Benjamin*, 172 F.3d at 149-50. By their nature, such aggregated claims target the actions of senior officials, and, indeed, the "prospective relief" that subsequently resulted typically took the form of consent decrees between plaintiffs and elected or appointed state officials or injunctions mandating action at the policymaking levels of the state or local government, not lower level government employees. *See, e.g.*, *id.* (discussing consent decrees that were entered in actions

brought by classes of pretrial detainees in mid-1970s). *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-22 (1997) (discussing the kinds of litigation in the 1970s and 1980s that catalyzed the political and judicial responses that ultimately resulted in the enactment of the PLRA).

We therefore decline the defendants' invitation to blindly import the 18 U.S.C. § 3626(g)(2) definition of "civil actions brought with respect to prison conditions" into 42 U.S.C. § 1997e(a) without regard to context and the distinct statutory purposes that these two provisions advance. *See Carter*, 1999 WL 14014, at *3-4; *Baskerville*, 1998 WL 778396, at *4. *Cf. French*, 120 S.Ct. at 2259 (automatic stay provision of § 3626(e)(2) "must be read not in isolation, but in the context of § 3626 as a whole"). And even to the extent that we may rely upon § 3626(g)(2), it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as "government officials," since such a reading of the term "officials" would include just about any government employee without regard to level of responsibility or authority. *See Giannattasio*, 2000 WL 335242, at *12.

An examination of the legislative history of the PLRA suggests the same result. The PLRA's sponsors broadly categorized the bill's provisions as being divided into two major sets of provisions: (1) those aimed at deterring frivolous suits by inmates by raising the cost to prisoners of engaging in "inmate litigation fun-and-games" (garnishment procedure in amendment to *in forma pauperis* provisions; exhaustion provisions; revocation of good-time credits for frivolous suits; prohibition against suing for mental or emotional injury absent showing of physical injury); and (2) those that establish "some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions . . . [in order to] restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison

systems." 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole, Majority Leader of the Senate). 10 With respect to the first category, floor statements overwhelmingly suggest that the concern over "frivolous" suits in this context refers to subject matter, rather than to the factual merits of a claim that, if proven, would be meritorious. *See, e.g.*, 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch, Chair of Senate Judiciary Committee) (PLRA is designed to "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying *actual violations of prisoners' rights*") (emphasis added); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (providing examples of "frivolous" cases to be prevented as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety").

As revealed by this examination of statutory purpose and context, it is clear that particular instances of assault or excessive force were never meant to be included within the ambit of § 3626(g)(2) at all. In context, it makes little sense to apply the definition in § 3626(g)(2) to particular cases of assault or excessive force that do not contemplate ongoing judicial supervision or some other form of "prospective relief" affecting large numbers of inmates-let alone individual claims that complain of past, wholly completed conduct-since § 3626 does not even cover claims for compensatory money damages. *See* 18 U.S.C. § 3626(g)(7) ("the term 'prospective relief' means all relief other than compensatory monetary damages"). In addition to the rather "inept" use of language that would result from the defendants' interpretation, *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), including particular claims of this sort would do nothing to advance the purpose of the section.

Consideration of the background Eighth Amendment principles against which Congress enacted the PLRA also supports this conclusion. Pre-PLRA Supreme Court

decisions disaggregate the broad category of Eighth Amendment claims so as to distinguish between "excessive force" claims, on the one hand, and "conditions of confinement" claims, on the other. In *Hudson v. McMillian*, for example, the Supreme Court reiterated that because "contemporary standards of decency always are violated" by the malicious and sadistic use of force against prisoners, a less rigorous showing of injury was required for such claims than for conditions of confinement claims, for which "only those deprivations denying the minimal civilized measure of life's necessities" give rise to claims under the Eighth Amendment. 503 U.S. 1, 9 (1992) (internal quotation marks omitted); *see also id.* at 11 ("To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." (internal quotation marks omitted)); *see also Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (distinguishing "excessive force" and "conditions of confinement" claims as being subject to different *mens rea* requirements).

The principles underlying this distinction are equally applicable here. While § 1997e(a) filters through administrative grievance procedures "prison conditions" claims that may be frivolous as to subject matter, the text, structure, purpose, and legislative history of the PLRA provide ample justification for not treating excessive force or assault claims in the same manner. Especially in light of our obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in § 1983 cases, *see City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982), we distinguish between "excessive force" and "prison conditions" claims for purposes of exhaustion under § 1997e(a) and conclude that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983.

CONCLUSION

We hold that Nussle was not required to exhaust DOC's administrative grievance procedures before bringing this action for excessive force and assault. We therefore REVERSE the District Court's judgment and REMAND for reinstatement of Nussle's complaint.

---- Begin EndNotes ----

1 The Attorney General claims that there is not, in fact, any correction officer at CCI named "Willette." Nussle has not, however, withdrawn the action as to this officer.

2 The District Court dismissed Nussle's substantive due process claim as redundant, and Nussle does not advance this claim on appeal.

3 Before the PLRA went into effect, the exhaustion provision of § 1997e(a) read as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e(a) (1994) (amended 1996).

4 The amended version of § 1997e(a) reads as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. 2000) (as amended by PLRA § 803).

5 Since we conclude that Nussle is not obligated to exhaust administrative remedies based on the subject matter of his complaint, we need not address his additional contention that since the DOC administrative grievance procedures make no provision for the award of monetary relief, he is not subject to the exhaustion requirement because there is no administrative remedy "available" to him. We note, however, that other circuits have divided over this issue. *Compare Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (same), *petition for cert. filed*, No. 99-1918 (May 30, 2000); *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999) (same); *and Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998) (same), *with Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), *cert. denied*, 120 S. Ct. 787 (2000); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998) (same); *and Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) (same). *Cf. Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any 'remedy.'").

6 In addition, the Fifth and Tenth Circuits have required exhaustion in cases involving excessive force, but without explicitly considering whether such claims properly fall within the § 1997e(a) requirement. *See Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997).

7 As Judge Noonan observes, the only other variant to this definition of "conditions" that is relevant to the term's usage in this statute-"something needing remedy" (as used in the sentence, "Trains were late to New York because of conditions in New Jersey")-suggests the same connotation. WEBSTER'S THIRD INTERNATIONAL DICTIONARY, *supra*, at 473; *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting).

8 Title 18, section 3626(g)(2) of the United States Code provides:

> (g) Definitions.-As used in this section-
>
> . . .
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (Supp. 1999) (as amended by PLRA § 802).

9 It should be noted that § 3626(g)(2) explicitly excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its reach. 18 U.S.C. § 3626(g)(2). Superficially, this exclusion might suggest that Congress meant to divide the universe of civil actions brought by prisoners into two broad categories-(1) habeas corpus actions challenging the very fact or duration of imprisonment, which are excluded from § 3626; and (2) actions that do not challenge imprisonment as such, but some particular aspect of imprisonment-and meant to include this second category in its entirety. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 139-40 (1991) (relying on similar categorization of prisoners' actions to interpret 28 U.S.C. § 636(b)(1)(B), which authorizes nonconsensual referral of petitions brought by

prisoners to magistrate judges); *Booth*, 206 F.3d at 295 (discussing *McCarthy*).

However, the fact that habeas actions have been excluded from § 3626(g)(2) does not mean that all other claims that might be brought by prisoners are necessarily included by negative implication. Since it is hardly obvious that excessive force and assault claims fall within either of § 3626(g)(2)'s two categories, it remains necessary for us to interpret the breadth of these categories to determine whether such claims fall within the definition of "actions brought with respect to prison conditions"-and indeed, to determine whether § 3626(g)(2) should be relied upon to interpret § 1997e(a) at all.

10 Senator Dole was an original co-sponsor of the PLRA. *See* 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 24th day of August, two thousand.

Before: Hon. Guido Calabresi,
Hon. Fred I. Parker,
Hon. Chester J. Straub,
Circuit Judges.

Docket No. 99-0387

RONALD NUSSLE,
Plaintiff-Appellant,

v.

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is

VACATED and REMANDED in accordance with the opinion of the Court.

FOR THE COURT;
ROSEANN B. MACKECHNIE,
Clerk
by
/s/ Beth J. Meador
Administrative Attorney

ISSUED AS MANDATE:
Sep. 19, 2000

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 4, 2001

Mr. Richard Blumenthal
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

RE: Correction Officer Porter, et al,
v. Ronald Nussle
No. 00-853

Dear Mr. Blumenthal:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter, Clerk

Supreme Court, U.S.
FILED
SEP 19 2001
OFFICE OF THE CLERK

No. 00-853

In The

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?

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STATEMENT OF THE FACTS

Ronald Nussle, an inmate in the custody of the Connecticut Department of Correction, was savagely and sadistically beaten by two prison guards on June 15, 1996. The guards beat him so badly he lost control of his bowels, and he was warned by the guards that he would be killed if he reported the beating. (Complaint, ¶¶ 3, 10-12).

On June 10, 1999, Mr. Nussle filed a Complaint in the United States District Court for the District of Connecticut. The District Court found that because Mr. Nussle had not filed an administrative grievance against his jailers, he had failed to exhaust his administrative remedies under the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) (PLRA), *codified at* 42 U.S.C. § 1997e(a). The act provides that "no action shall be brought with respect to prison conditions . . . until such remedies as are available are exhausted."

The United States Court of Appeals for the Second Circuit reversed the District Court's determination that a sadistic, random and unauthorized beating is a "prison condition" within any conceivable reading of the PLRA. *Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir. 2000). Thereafter, the petitioners in this case sought certiorari, which was granted. The petitioners and amici now come to this Court to argue that malice, sadism and savagery at the hands of state employees is as much a condition of prison life as being served institutional food, and being required to sleep in bunk beds.

SUMMARY OF THE ARGUMENT

The Prison Litigation Reform Act's (PLRA) exhaustion requirement was intended to deter frivolous litigation by prison inmates by requiring that prisoners first make administrative complaints before turning to the courts to litigate claims arising from prison conditions. Nothing in the text of the act itself, the legislative history of the act, or in this Court's Eighth Amendment jurisprudence supports a theory that random, unauthorized acts of sadistic violence by state employees are a prison condition.

Indeed, this Court's Eighth Amendment jurisprudence makes clear that there is a bright line distinguishing random and unauthorized acts of sadistic violence from prison conditions. Given the presumption that Congress is aware of this Court's decisions, and the lack of anything in the legislative history of the PLRA supporting a claim that virtual lawlessness was viewed by Congress as a prison condition, it is clear that exhaustion of excessive force claims is not required under the PLRA.

ARGUMENT

An inmate who is the victim of a sadistic beating by a prison guard and then files suit is not making a complaint about "prison conditions". Congress did not intend to require that acts amounting to criminal behavior be treated as a condition of confinement. The position advanced by petitioners is inconsistent with both the language and the structure of the Prison Litigation Reform Act, which convey a clear intent to limit the

exhaustion requirement to cases challenging conditions of confinement, not isolated claims of intentional assault by individual correctional officers. Moreover, petitioners' interpretation of the Act as applying to every kind of prisoner lawsuit is contrary to this Court's Eighth Amendment jurisprudence, which recognizes a clear distinction between claims of excessive force and actions challenging conditions of confinement.

I. THIS ACTION IS NOT ONE INVOLVING "PRISON CONDITIONS" AS IT ARISES UNDER 42 U.S.C. SECTION 1983 AND IS A CLAIM THAT AN INMATE WAS THE VICTIM OF VIOLENCE BY STATE ACTORS INSPIRED BY THE SADISTIC DESIRE TO CAUSE PAIN

Ronald Nussle is an inmate in the custody of the State of Connecticut. In his complaint, he alleges that on June 15, 1996, he was savagely beaten by his jailers to the point that he lost control of his bowels. He was then threatened with death if he reported the incident. On behalf of his jailers, the petitioners and amici contend that these beatings and threats are mere conditions of confinement, and urge this Court to adopt a rule of law that would equate the term prison conditions with random, unauthorized and individual acts of sadism and brutality. This Court has long recognized that application of the Bill of Rights does not stop at the jail house door, and there is no reason to begin now to believe that Congress intended to sanction, or did sanction, anarchy behind prison walls.

Mr. Nussle's case arises under the Eighth Amendment to the United States Constitution and its prohibition

against cruel and unusual punishment. It was filed under 42 U.S.C. § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case law is clear and unambiguous: "[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1992). As this Court has recognized, there are times when the administration of pain is part of prison administration. Force may be necessary, for example, to put down a prison disturbance. " 'The question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm,' " *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 999 (1992); *Whitley*, 475 U.S. at 320-321, 106 S.Ct. at 1085; or that officials used force with "a knowing willingness that harm occur." *Id.*, at 7, 112 S.Ct., at 99.

This Court recognizes the obvious distinction between excessive force claims and "claims based on conditions of confinement". *Hudson*, at p. 11. "To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." *Id.*, at 11 (quotation marks omitted); *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290 (1976).

Being violently assaulted in prison simply is not "part of the penalty that criminal offenders pay for their offenses against society." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (1994), *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2400 (1981). Claims of excessive force in the prison context are different from routine conditions of confinement claims, or from claims arising from a denial of medical treatment.

> The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." *Estelle, supra*, 429 U.S., at 103, 97 S.Ct., at 290. For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," *Rhodes, supra*, 452 U.S., at 347, 101 S.Ct., at 2399, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson, supra*, 501 U.S., at 298, 111 S.Ct., at 2324 (quoting *Rhodes, supra*, 452 U.S., at 347, 101 S.Ct., at 2399) (citation omitted). A similar analysis applies to medical needs. Because society does

not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." See *Estelle v. Gamble*, 429 U.S., at 103-104, 97 S.Ct., at 290-291. In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See *Whitley, supra*, 475 U.S., at 327, 106 S.Ct., at 1088. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See *Estelle, supra*, 429 U.S., at 102, 97 S.Ct., at 290 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]").

Hudson, 503 U.S. at pp. 8-9.

II. THE PRISON LITIGATION REFORM ACT'S USE OF THE TERM "PRISON CONDITION" DOES NOT APPLY TO CLAIMS OF RANDOM, ISOLATED AND UNAUTHORIZED EXCESSIVE FORCE

Exhaustion of administrative remedies is not generally a prerequisite to maintaining an action under 42

U.S.C. § 1983 and statutory exceptions to this rule must be construed narrowly. *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1082); *see also Heck v. Humphrey*, 512 U.S. 477 (1994). As this Court recognized in *Patsy*: "The very purpose of [Section] 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " *Patsy*, 457 U.S. at 503 (citations omitted). In *Patsy*, this Court was unwilling to create a sweeping exhaustion requirement for 1983 claims absent explicit authorization of such a requirement by Congress. Although *Patsy* was decided well before the recent amendments to the PLRA, the language of the case is instructive, showing, as it does, this Court's recognition of the complexity of 1983 claims and indicating, as it does, that this Court has long recognized the fact that not all 1983 claims are alike. "The very variety of claims, claimants, and state agencies involved in [Section] 1983 claims argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain [Section] 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted [Section] 1997e, taking the largest class of [Section] 1983 actions and constructing an exhaustion requirement that differs substantially" from other types of claims. "It is not for us to say whether Congress will or should create a similar scheme for other categories of [Section] 1983 claims. . . . " *Patsy* at p. 11.

Despite this general rule of non-exhaustion, Congress has carved out an exception in certain cases brought by prisoners. The first inmate exhaustion provision was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Acts (CRIPA), which was codified at 42 U.S.C. § 1997e.[1] The provision was only a narrow exception to the general rule on non-exhaustion, *see Patsy*, 457 U.S. at 508, that provided a discretionary mechanism by which courts could require prisoners to exhaust prison grievance procedures before bringing suit under § 1983.

When Congress enacted the PLRA in 1996, it amended the exhaustion provision contained in Section 1997e(a), significantly expanding its scope by making it mandatory, rather than discretionary. The new version of Section 1997e reads as follows:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

[1] It read as follows: "(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes such a requirement would be appropriate and in the interests of justice, continue such case for a period not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

"(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective."

42 U.S.C. § 1997e(a) (Supp. 2000). At the same time that it expanded the scope of Section 1997e(a), the PLRA also limited the applicability of the act to federal actions that are brought **with respect to prison conditions**. Thus, whereas the prior act provided for discretionary exhaustion of any and all claims arising under 42 U.S.C. § 1983, the amended act requires only those federal claims targeted at prison conditions be subject to the now mandatory exhaustion requirement.

The petitioners in this case seek to have this Court focus only on that portion of the PLRA that requires exhaustion. The limitation of the PLRA's applicability to cases involving prison conditions is also significant; in this case it is critically so. The PLRA is now mandatory, but only with regard to claims about conditions of confinement.

III. THE PHRASE "ACTION . . . WITH RESPECT TO PRISON CONDITIONS" DOES NOT ENCOMPASS ACTIONS INVOLVING RANDOM AND UNAUTHORIZED ACTS OF SADISTIC VIOLENCE

"When Congress acts to amend a statute, the amendment is presumed to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). By adding the language "with respect to prison conditions" to Section 1997e(a), Congress must have meant to limit the scope of that section – otherwise, the new language would be

superfluous. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

An act of sadistic violence does not give rise to a claim an action "brought with respect to prison conditions." To suggest otherwise is to strain the text, structure, legislative history and purpose of the amended version of Section 1997e(a) beyond recognition.

A. The Ordinary, Contemporary, and Common Meaning of the Term "Prison Conditions" Does Not Include Claims Involving Sadistic Acts of Violence

The most natural reading of the exhaustion provision of the PLRA is that the phrase "action . . . with respect to prison conditions" is limited to complaints about widespread and virtually universal circumstances of prison life, such as overcrowding, poor medical care, health and safety hazards. Only this reading conforms with the common usage of the phrase "prison conditions," this Court's understanding of that meaning in its Eighth Amendment jurisprudence, and Congress' use of identical language in related contexts.

Consider first the very plain and ordinary words of the PLRA. Exhaustion is required before any claim can be brought to our courts "with respect to prison conditions." The only real question here is the meaning of the term "prison conditions."

Statutory language must be read according to its "ordinary, contemporary, common meaning."[2] *Perrin v. United States*, 444 U.S. 37, 42 (1979). This is particularly true where, as here, the term used in a statute is undefined. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). By common usage, the term "prison conditions" refers to the ordinary circumstances of prison life. Such circumstances can range from aspects of the physical environment, *e.g.*, the provision of adequate living space, food, clothing, and medical care, to policies pertaining to access to legal counsel and disciplinary procedures. But it strains the "ordinary, contemporary, common meaning" of the phrase beyond all reason to suggest that a guard who engages in a random and unauthorized act of violence has created a "prison condition."

As Justice Scalia commented in *Johnson v. United States*, 529 U.S. 694 (2000), "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *Id.* at 718 (Scalia, J., dissenting). On the petitioner's theory of this case, the following colloquy would be unremarkable at a cocktail party:

> Nigel: "So, Quenton, how was your day today? I understand you've recently taken work as a prison guard?"

---

[2] "[T]he meaning of a word is its use in the language." Wittgenstein, *Philosophical Investigations* (Blackwell, 1953) p. 43. These words, though philosophical, resonate throughout Justice Antonin Scalia's warning about the dangers of judicial fancy in statutory construction. Scalia, Antonin, *A Matter of Interpretation* (Princeton, 1997) pp. 12-14.

> Quenton: "Nothing unusual really happened today. Same old thing. I did beat a man so badly today that he lost control of his bowels, but I warned him not to tell my supervisor."

Surely this colloquy would be remarkable. Or, to put it in another, more chilling and tragic context, no one working in lower Manhattan on September 11, 2001, would view terrorism as a condition of employment on the island. Some things are beyond the pale, whether at work in a city, or confined behind bars. Random and unauthorized acts of sadistic violence are never acceptable conditions in a civilized society.

B. The Court's Well-Established Eighth Amendment Precedents Distinguish Between "Prison Conditions" and "Excessive Force" Claims

Consistent with common usage, the Court has employed the term "prison conditions" in a myriad of cases to describe the ordinary circumstances of prison life. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978) (challenging cell size, sleeping arrangements, food, working conditions and widespread incidence of prisoner-on-prisoner violence); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (challenging overcrowding); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenging a "potpourri" of generalized policies, including those limiting prisoner access to publications, authorizing random shake-downs, and mandating body-cavity searches after visits); *Procunier v. Martinez*, 416 U.S. 396 (1974) (challenging, *inter alia*, regulations limiting prisoners' access to mail).

More recently, the Court has drawn a sharp distinction between actions that challenge "prison conditions"

and those alleging "excessive force." In *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court directly addressed this distinction:

> [E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. . . .
>
> In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.

Id. at 9 (internal quotation marks and citations omitted).

The Court rejected as "unfounded" the argument that claims based on excessive force and claims based on prison conditions are no different in kind, and pointed out the obvious: **"To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment."** *Id.* at 11 (internal citations omitted) (emphasis added).

Two years later, the Court reaffirmed this distinction in *Farmer v. Brennan*, 511 U.S. 825 (1994):

> [A]pplication of the deliberate indifference standard is inappropriate **in one class of prison cases**: when officials stand accused of using excessive physical force. In such situations,

> where the decisions of prison officials are typically made in haste, under pressure, and frequently without the luxury of a second chance, an Eighth Amendment claimant must show more than indifference, deliberate or otherwise. The claimant must show that officials applied force maliciously and sadistically for the very purpose of causing harm, or, as the Court also put it, that officials used force with a knowing willingness that [harm] occur. **This standard of purposeful or knowing conduct is not, however, necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement; the very high state of mind prescribed by *Whitley* does not apply to prison conditions cases.**

Id. at 835-36 (internal citations and quotation marks omitted) (emphasis added); *see also id.* at 832 ("In its prohibition of 'cruel and unusual punishment,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates.").

When Congress enacted the PLRA, it presumably was aware of the Court's well-settled distinction between "conditions-of-confinement" claims, on the one hand, and "excessive force" claims, on the other. "Where Congress uses the terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute dictates, that Congress means to

incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 (1981); *see also Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."); *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (courts often discern congressional intent by reading the text of the statute in the light of the legal principles that operate in the relevant areas of the law). Because Congress must be presumed not to have legislated in derogation of this Court's well-established Eighth Amendment jurisprudence, petitioners' attempt to erase the clear distinction between "prison conditions" and "excessive force" cases should be rejected.

Petitioners devote a large portion of their brief to a refutation of the Second Circuit's distinction between "single incidents" (which the court found were not subject to the exhaustion requirement) and systemic prison-wide problems (which the court found were subject to Section 1997e(a)). *See* Pet. Br. 12-19. This argument has only superficial appeal, and ignores the complexity of this Court's decisions regarding this issue.

The Second Circuit reasoned that Congress must have had something in mind when it drafted the PLRA and chose to refer to "prison conditions." "[T]he term 'conditions,' used in its plural form, denotes 'attendant circumstances' or an 'existing state of affairs' – as exemplified by such ordinary phrases as 'living conditions,' 'playing conditions,' and 'adverse weather conditions.'

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961). Thus, " 'prison conditions' in [Section] 1997e would appear to refer to 'circumstances affecting everyone in the areas affected by them,' rather than 'simple or momentary matter[s], such as beatings or assaults, that are directed at particular individuals.' " *Nussle*, JA p. 62, *citing Booth v. Churner*, 206 F.3d 289, 300-01 (3d Cir. 2000) (Noonan, J., concurring and dissenting); *rev'd on other grounds, Booth v. Churner*, 121 S.Ct. 1819 (2001).

In *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991), this Court rejected an argument facially similar to that advanced here. In that case, the Court interpreted Congress' used the term "conditions of confinement" in the Magistrates Act as codified at 28 U.S.C. § 636(b)(1)(B).[3] Of particular concern to the Court in *Bronson* was the fear that adopting a distinction between systemic conditions and isolated acts "would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Bronson*, at p. 143. No such difficulty presents itself in the case of an isolated sadistic act of violence. There is no claim here that a prison guard who engaged

[3] The Act read, in pertinent part, as follows: "(b)(1) Notwithstanding any provision of law to the contrary – . . .

(B) a judge may . . . designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

in criminal conduct was acting in the course of prison policy, custom or practice; no line-drawing is necessary on the facts presented here.

Similarly, in *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court appears to have rejected a distinction between "short-term or one-time" events and "continuing or systemic conditions." *Id.*, at p. 300. However, the manner in which the Court rejected such a distinction supports the respondent's contention here that a claim of sadistic violence is *sui generis*, and that the character of the act of sadistic violence makes it easy to identify, and removes it from any conceivable universe of affairs that this Court could recognized as a prison condition. By focusing on the intent necessary to make out an Eighth Amendment claim, this Court recognized that some prisoners' claims about the treatment they suffer at the hands of their jailers are not claims about the conditions of confinement. Rather, the salient feature of these claims is the mental state of the tortfeasor. "The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent, . . . but there is no logical reason why it should cause the *requirement* of intent to evaporate." *Id.*, at pp. 300-301.[4]

[4] "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interest or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause, whether that conduct occurs in connection with

Bronson is inapplicable for other reasons as well. In *Bronson*, the Court held that the term "conditions of confinement" contained in the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B) includes claims of single incidents of excessive force. *Bronson*, 500 U.S. at 139. As petitioners point out, "the issue raised by Bronson and addressed by the Court was whether the words conditions of confinement includes continuous conditions and excludes isolated incidents." Pet. Br. 14 (quoting *Bronson*, 500 U.S. at 139). The Court did not discuss – let alone decide – the issue presented here. Nothing in *Bronson* requires, or even suggests, that random and unauthorized acts of sadistic violence are ever to be regarded by a court as a condition of confinement.

Petitioners point to the oft-repeated maxim that Congress is presumed to expect its statutes to be read in conformity with the Court's precedents, *see United States v. Wells*, 419 U.S. 482, 495 (1997), to argue that Congress enacted the PLRA against a legal landscape that included *Bronson's* definition of "conditions of confinement." But the PLRA – a statute relating to mainly Eighth Amendment claims by prisoners – was enacted against a much more current and relevant legal landscape than *Bronson* – a landscape that included the recently decided Eighth Amendment decisions in *Hudson* and *Farmer*. Those decisions – issued *after Bronson* was decided and just prior to the passage of the PLRA – make a clear distinction between excessive force and conditions of confinement

---

establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1992).

cases and are the proper legal landscape against which to evaluate Congressional intent.

There is an additional reason *Bronson* does not compel a result in favor of respondents. *Bronson* was a Seventh Amendment challenge to the Magistrate's Act, a wholly different constitutional attack on a completely unrelated statute. The principle invoked by petitioners – that Congress is presumed to legislate against the background of this Court's precedent – "does not stretch to cover an . . . interpretation of a statute dealing with a different subject." *Johnson v. United States*, 529 U.S. 694, 726 n.7 (2000) (Scalia, J., dissenting).

Petitioners also rely on *Bronson* for their argument that Congress meant to divide the universe of prison cases into only two categories: (1) habeas corpus actions; and (2) all other prison cases, including those alleging excessive force by prison guards. *See* Pet. Br. 14 (citing *Bronson*, 500 U.S. at 139; *Preiser v. Rodriguez*, 411 U.S. 496, 498-99 (1973)). But as the Court of Appeals below pointed out, "the fact that habeas actions have been excluded from [the PLRA] does not mean that all other claims are necessarily included by negative implication." *Nussle*, 224 F.3d at 103 n.9.

C. Congress' Presumed Familiarity With This Court's Qualified Immunity Doctrine Further Indicates A Lack Of Intent To Require Exhaustion in Cases Involving Random and Unauthorized Acts Of Sadistic Violence

No prison guard can be found liable for excessive force in an Eighth Amendment case unless it can be

proven that the guard's actions were "malicious and sadistic." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). A plaintiff must also overcome the affirmative defense that a reasonable guard in the defendant's position could have thought the force involved was appropriate. *See Saucier v. Katz*, 121 S.Ct. 2151, 2159 (2001) (qualified immunity defense applicable to excessive force cases). This affirmative defense of qualified immunity would be applicable in every case in which the force used was indeed a condition of confinement, that is, standard or widespread within the prison, or approved by supervisors. Congress was presumably aware of the defense of qualified immunity when it wrote the PLRA. Therefore, a "conditions of confinement" exclusion would be redundant in an excessive force prison case because ordinarily a guard cannot be liable for a beating that is not random and unauthorized. In other words, a plaintiff can prevail in the face of qualified immunity only for those acts that are not conditions of confinement. As this Court held in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." A prison guard's actions are objectively unreasonable, and thus unprotected by qualified immunity, only when "no officer of reasonable competence could have made the same choice in similar circumstances." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995).

Congress was aware at the time it crafted the PLRA that there were random and unauthorized acts of sadistic violence in our nation's prisons, and that these acts are not a condition of confinement. Clearly claims arising from such violence are not subject to the exhaustion requirement.

D. The Court Should Not Import The Definition of "Prison Conditions" From A Different Section Of The U.S. Code Into Section 1997e(a)

Petitioners next argue that the Court should import a definition of "prison conditions" that is contained in a wholly different statute, 18 U.S.C. § 3626(g)(2), into Section 1997e(a). Enacted as part of the PLRA, but codified in a different statute altogether, Section 3626 includes the following:

> (g) Definitions. – **As used in this section** –
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (emphasis added).

This section's reference to "conditions of confinement" is no more apt to include excessive force than the reference to "prison conditions" in Section 1997e(a) itself, *see Nussle*, 224 F.3d at 102. Petitioners rely heavily on the second category of actions covered by Section 3626(g)(2): "the effects of actions by government officials on the lives of persons confined in prison." The petitioners contend, in effect, that the phrase "the effects of actions by government officials on the lives of persons confined in prison" is mere surplusage, at most a synonym presenting another view of what the term "prison conditions" actually means.

Petitioners' argument fails for several fundamental reasons.

First, the definition of "prison conditions" contained in Section 3626(g)(2), by its own terms, only applies to this section – *i.e.*, 18 U.S.C. § 3626(g)(2).

Second, the definition appears in an entirely different section of the PLRA and is codified in a different statute altogether in the U.S. Code. Respondents counter by arguing that Section 1997e(a) should be read *in pari materia* with 18 U.S.C. § 3626(g)(2) given the canon of statutory construction that language used in one portion of a statute should be deemed to have the same meaning as the same language used elsewhere in the statute. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260 (1993).

But Sections 3626(g)(2) and 1997e(a), enacted by Sections 802 and 803 of the PLRA, respectively, advance entirely distinct statutory purposes. Unlike 42 U.S.C. § 1997e(a), 18 U.S.C. § 3626 is concerned with preventing courts from "micromanaging" prison systems and usurping the authority given to prison administrators to decide matters of routine prison administration. *See Miller v. French*, 530 U.S. 327, 332 (2000); *see also* 141 Cong. Rec. S14317-18 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation."). Even if read *in pari materia* the petitioners' argument fails for the simple reason that there is no conceivable universe under the Eighth Amendment that would tolerate, much less require, the management of random and unauthorized

acts of sadistic violence. The conduct at issue here is "off the charts," and the petitioners perhaps concede too much by arguing that it differs perhaps only in degree from tolerable conduct by prison officials.

When the phrase "effects of actions by government officials on the lives of persons confined in prison" is considered in the light of Section 3626's purpose, it is clear that the phrase concerns actions by prison officials that have broad effects on prison policy and administration. The phrase cannot be fairly read to apply to a prisoner's claim of excessive force given that the resolution of such claims by the courts does not ordinarily implicate the routine, orderly administration of prisons.

Given that the two different sections of the PLRA are aimed at two entirely different purposes and are even codified in different parts of the U.S. Code, the normal presumption of statutory construction – that identical words used in different parts of the same statute are presumed to have the same meaning – does not apply. *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). As the Court has recognized, where repetitive language creates confusion as to a phrase's meaning in different sections of an act, it is critical that the interpretation of each provision be consistent with Congress' intent. *Id.*

> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving the word the meaning which the legislature intended it should have in each instance.

Id. at 433; *see also District of Columbia v. Carter*, 409 U.S. 418 (1973) (the phrase "state or territory" might have a different meaning under 42 U.S.C. § 1982 than under 42 U.S.C. § 1983), *Dewsup v. Timm*, 502 U.S. 410 (1992) (the same term might be used differently within two subsections of the same section of the Bankruptcy Code).

In the light of the purpose of Section 3626, moreover, the term "government officials" used Section 3626(g)(2) is "most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority." *Nussle*, 224 F.3d at 104. As the court below pointed out, a similar use of the term "official" in a different part of Section 3626 supports this conclusion. Section 3626(a)(3)(F), which addresses the issuance of prison release orders, confers standing to oppose such orders on any "State or local official" whose "jurisdiction of function" includes the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. Like in Section 3626(g)(2), this use of the word "official" in Section 3626(a)(3)(F) clearly refers to those prison officials with administrative or policymaking authority.

As the court below also pointed out, the institutional reform actions to which 18 U.S.C. § 3626 is aimed were targeted at senior officials, such as wardens, superintendents, and state-wide commissioners. Likewise, the prospective relief to which Section 3626 is addressed

typically took the form of consent decrees between classes of inmates and these high-level officials, or injunctions mandating action at the policymaking levels of government. Section 3626 has no applicability to the actions of low-level prison guards.

Finally, even if 18 U.S.C. § 3626's definition of "prison conditions" were to apply to 42 U.S.C. § 1997e(a)'s use of the same phrase, the phrase "the effects of actions by government officials on the lives of prisoners" does not clearly encompass excessive force claims. As Judge Noonan of the Third Circuit has pointed out, the phrase makes no sense when used to apply to allegations of excessive force:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such phraseology to express the blow.

Booth v. Churner, 206 F.3d 289, 302 (3d Cir. 2000) (Noonan, J., concurring and dissenting) (*rev'd on other grounds*, *Booth v. Churner*, 121 S.Ct. 1819 (2001); *cf. Booth*, *id.* at 1824 (noting it would be "very strange usage" to say that a prisoner must "exhaust" an administrative order before a prisoner could go to court). No matter what linguistic gymnastics are employed, a vicious, random and unauthorized beating by a prison guard simply cannot be fairly described as an "action by a government official having an effect on the life of a prisoner."

In sum, the Court should decline petitioners' invitation to import the 18 U.S.C. § 3626(g)(2) definition of "civil actions with respect to prison conditions" into 42 U.S.C. § 1997e(a), given the limitation expressly contained in Section 3626(g), the distinct statutory purposes advanced by the two provisions, and the text itself of Section 3626(g)(2)'s definition.

IV. THE PLRA'S LEGISLATIVE HISTORY SUGGESTS THAT SECTION 1997e(a) DOES NOT APPLY TO CLAIMS OF EXCESSIVE FORCE

The legislative history of the PLRA suggests that Congress understood the term "prison conditions" in the same manner the term is used in this Court's Eighth Amendment jurisprudence when it amended Section 1997e(a). According to Senator Abraham, a PLRA sponsor:

> [L]awsuits over **prison conditions** have included disputes over how warm the food is, how bright the lights are, whether there are electrical outlets in each cell, whether windows have been inspected and certified up to code, whether prisoners' hair is cut by only licensed barbers, and whether air and water temperatures are comfortable.

Hearing before the Committee on the Judiciary, "Prison Reform, Enhancing the Effectiveness of Incarceration," S. Hrg. 104-573, p. 5 (July 27, 1995) (emphasis added); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) (discussing courts' alleged micromanagement of prison conditions to determine "how warm the food is; second, how bright the lights are; third,

whether there are electrical outlets in each cell; fourth, whether windows are inspected and up to code; fifth, whether prisoners' hair is cut only by licensed barbers; and sixth, [sic] whether air and water temperatures are comfortable.").

The PLRA's legislative history confirms the distinction evident throughout the Court's prisoner-rights cases: a claim challenging conditions of confinement is different from one alleging excessive force. There is nothing in the legislative history suggesting that Congress intended random and unauthorized sadistic violence to be treated as a prison condition. Indeed, the record is rife with examples of what Congress sought to deter – complaints about food, clothing, bedding, and the uniform terms and conditions of prison life. This effort by the petitioners to trivialize and diminish this Court's work in securing the rights of prisoners and drawing crucial distinctions between important Constitutional rights and the ephemera of prison administration ought to be rejected. If Congress meant to include sadism and violence in its list of conditions of confinement surely the record would reflect at least one passing reference to this intent. Against the backdrop of this Court's Eighth Amendment jurisprudence, the only conclusion that can and should be drawn by this Court is that exhaustion is not required for cases involving criminal behavior. If this is not what Congress intended, it can easily amend the PLRA to set the record straight.

CONCLUSION

The language and structure of 42 U.S.C. § 1997e(a), together with the Court's well-established Eighth Amendment jurisprudence, are fundamentally incompatible with the interpretation of Section 1997e(a) advanced by petitioners. By far the more coherent interpretation of the phrase "actions . . . with respect to prison conditions" is that it refers to the everyday living conditions endured by prison inmates, not to random, unauthorized and vicious beatings by prison guards. The Court of Appeals' decision should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,
Petitioners,
v.

RONALD NUSSLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF THE ARGUMENT

The petitioners hereby reply to respondent's brief on the merits. As discussed in the petitioners' opening brief, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 100 Stat. 1321-73 (1996)("PLRA"), *codified* at 42 U.S.C. § 1997e(a), requires prisoners to exhaust available administrative remedies before bringing "an action with respect to prison conditions[.]" Contrary to respondent's contention, the phrase "action with respect to prison conditions" encompasses claims concerning particular instances of unconstitutional conduct, including claims of excessive force. This conclusion is compelled by the relevant decisions of this Court, particularly in *McCarthy v. Bronson*, 500 U.S. 136 (1991); *Wilson v. Seiter*, 501 U.S. 294 (1991); and *Preiser v. Rodriguez*, 411 U.S. 496 (1973). The cases relied upon by respondent -- *Hudson v. MacMillian*, 503 U.S. 1 (1992), and *Farmer v. Brennan*, 511 U.S. 825 (1994) -- concern the narrow and unrelated issues of the proof and mental states necessary to establish different Eighth Amendment claims. *Farmer* and *Hudson* simply have nothing to do with the PLRA's exhaustion of administrative remedies requirement or the principles underpinning it.

The interpretation of the PLRA's exhaustion requirement advocated by the petitioners and adopted by six Courts of Appeal does not, as respondent argues, strip the limiting words "with respect to prison conditions" of their natural meaning. *See* Petitioners' Opening Brief at 6 n. 3 (citing Circuit Court decisions). Rather, Congress' use of this language, consistent with this Court's use of the same or similar language in *Preiser*, *Bronson*, and *Wilson*, excludes only *habeas corpus* petitions challenging the fact or duration of confinement, which are subject to independent exhaustion requirements, and claims preceding and unrelated to a would-be inmate plaintiff's incarceration.

Moreover, as evidenced by its post-*Nussle* decisions, the Court of Appeal's interpretation of Section 1997e(a) clearly contravenes Congress' intent by unnecessarily burdening the district courts and significantly weakening the PLRA's exhaustion requirement.

ARGUMENT

A. UNDER THE RELEVANT DECISIONS OF THIS COURT, A CLAIM OF EXCESSIVE FORCE IS AN ACTION WITH RESPECT TO PRISON CONDITIONS FOR PURPOSES OF THE PLRA'S EXHAUSTION REQUIREMENT

In the face of overwhelmingly persuasive caselaw to the contrary, respondent nevertheless argues that this Court's Eighth Amendment decisions require the exclusion of claims of single instances of unconstitutional conduct, such as excessive force claims, from 1997e(a)'s exhaustion requirement. *See* Respondent's Brief at 12-19. Specifically, respondent relies on this Court's decisions in *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Hudson v. McMillian*, 503 U.S. 1 (1992). Those decisions, however, arose in markedly different contexts and concern the narrow and entirely unrelated issues of the proof and mental states necessary to sustain different Eighth Amendment claims. *See Farmer*, 511 U.S. at 835-36 (discussing distinctions in mental state requirement between excessive force and deliberate indifference claims under the Eighth Amendment); *Hudson*, 503 U.S. at 9 (holding that no significant physical injury needed to sustain claim of excessive force). There is no evidence that Congress intended somehow to incorporate the evidentiary distinctions established in *Hudson* and *Farmer* into the preliminary exhaustion requirement of Section 1997e(a).

Those cases say nothing about classifying inmate claims so as to ease judicial burdens, decrease federal court entanglement in prison administration, and reduce the number of inmate lawsuits filed under 42 U.S.C. § 1983, all of which Section 1997e(a) was designed to facilitate, *see, e.g., Booth v. Churner*, 121 S.Ct. 1819, 1823 (2001); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995)(statement by co-sponsor Senator Hatch)(describing purpose of PLRA as aimed at reducing the "crushing burden" of inmate suits on courts); *Id.* at 14573 (statement of Senator Kyl)("An exhaustion requirement is appropriate for prisoners given the burden that their cases place on the Federal court system, the availability of administrative remedies, and the lack of merit of many of the claims."). Conversely, this Court's decisions in *McCarthy*, *Preiser* and *Wilson* speak directly to those subjects and compel the conclusion that claims alleging single instances of unconstitutional conduct are "actions ... with respect to prison conditions" for purposes of Section 1997e(a). Neither respondent nor the Court of Appeals below has offered a convincing reason to deviate from those decisions.

In *Hudson v. McMillian*, 503 U.S. 1, 7-9 (1992), this Court considered the question of whether a prisoner claiming excessive force must allege and prove significant injury. Respondent relies heavily on the fact that the Court in *Hudson* distinguished excessive force claims from both medical deliberate indifference claims and what it termed, without elaboration, "conditions of confinement" claims. *Id.* at 8-9. The Court made this distinction, however, for the exceedingly narrow and limited purpose of clarifying the type of harm that must be shown to make out different Eighth Amendment claims. The Court's discussion and holding in *Hudson* did not in any way concern the far more basic, preliminary issue presented here: whether an inmate alleging excessive force may bring his claim directly into

federal court. More generally stated, *Hudson* concerned what the inmate must show once in court to prevail, but not whether the inmate may come to court in the first place.

Similarly in *Farmer v. Brennan*, 511 U.S. 825 (1994), respondent's other principal case, the Court again clarified a finer point regarding the proof necessary to establish different Eighth Amendment claims. Specifically, in *Farmer*, the Court distinguished the mental state that must be shown to prevail on an excessive force claim from that in a claim "challenging conditions of confinement." *Id.* at 835-36. Again, however, the Court did not consider or discuss whether the district court should entertain the case in the first place or whether it should render judgment on the merits. Rather, as in *Hudson*, the Court clarified what an inmate plaintiff must show in order to prevail and obtain judgment. Considerations of judicial economy and deference to state authorities -- the key purposes underlying § 1997e(a) -- simply did not enter into the equation in *Hudson* and *Farmer*.

In *Preiser v. Rodriguez*, 411 U.S. 496, 498-499 *(1973)*, this Court was asked to make a fundamental determination about the kinds of inmate claims that may be asserted in the district court under 42 U.S.C. § 1983, a question far more analogous to the present one than those decided in *Hudson* and *Farmer*. The *Preiser* Court held that an inmate alleging unconstitutional deprivations of good time must pursue a federal *habeas corpus* petition, which would require exhaustion of state court *habeas corpus* remedies, rather than seek equitable relief under 42 U.S.C. § 1983. In so holding, the Court divided the universe of inmate claims into two broad categories -- challenges to "the fact or length of custody of confinement" and all other constitutional challenges by a prisoner to "the conditions of his prison life." *Id.* at 499. As examples of claims in the second category, the Court cited three cases, all involving single instances of unconstitutional conduct:

Cooper v. Pate, 378 U.S. 546 (1964)(denial of religious publications); *Houghton v. Shafer*, 392 U.S. 639 (1968)(confiscation of legal materials); and *Haines v. Kerner*, 404 U.S. 519 (1972)(placement of inmate in solitary confinement). Under *Preiser*, this Court clearly considered a claim alleging a single instance of unconstitutional conduct, such as the momentary application of excessive force, as concerning conditions of prison life.

Preiser is important not only for the way it categorized inmate claims, but for its context and policy underpinnings, which resonate clearly in this case. In drawing a bright line between challenges to the fact or duration of confinement on the one hand and all other prisoner claims on the other, the *Preiser* Court did not concern itself with the niceties of evidentiary requirements and necessary mental states as it had in *Farmer* and *Hudson*. Instead, the Court made a far more basic determination as to the types of inmate cases the district courts should entertain and when they should entertain them.

Because this is precisely the sort of determination the Court must make in this case, there is no compelling reason to revise the categories established by *Preiser*. The fact that *Hudson* and *Farmer* may have distinguished the proof requirements applicable to excessive force claims from those applicable to other claims under the Eighth Amendment in no way indicates that such claims are to be treated differently for the preliminary purpose of determining when and how such claims may first be presented to the district courts under the PLRA. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 266 (1985)(requiring uniformity of treatment for all claims asserted under 42 U.S.C. § 1983, regardless of precise constitutional claim at issue, for purposes of statute of limitations, noting that the "federal interests in uniformity, certainty, and the

minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.")

Moreover, just as Congress intended Section 1997e(a) to promote deference to state prison authorities, *Preiser* was grounded on "a proper respect for state functions[,]" *Id.* at 491. Indeed, the Court noted that:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons ... Since [the] internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems ... The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Id. at 492.

The Court's reasoning in *Preiser* applies just as forcefully to exhaustion of administrative remedies under the PLRA as it does to exhaustion of state court *habeas* proceedings -- both of which provide state authorities an opportunity to address potential problems in prison administration and avoid, or at least reduce, entanglement of the federal judiciary in state functions. *See Booth v. Churner*, 206 F.3d 289, 295 (3d Cir. 2000)(noting that Congress intended by the PLRA to "reduce the intervention of federal courts into the management of the nation's prison

systems.") Nothing about an excessive force claim -- or a claim of any sort of isolated incident of unconstitutional conduct -- magically diminishes or negates the vital state interests recognized in *Freiser*. To the contrary, common sense suggests that state prison authorities have far stronger, more pressing interests in learning of and addressing the potential for physical abuse by correction officers than they would in learning of bad haircuts, the failure to invite an inmate to a pizza party, or other kinds of inmate complaints that respondent would presumably concede must be exhausted before suit. *See* 141 Cong. Rec. S26,548 (1995)(statement of Sen. Kyl characterizing examples of lawsuits filed by prisoners).

Even more compelling is this Court's decision in *McCarthy v. Bronson*, 500 U.S. 136 (1991), which interpreted a provision in the Magistrate's Act permitting nonconsensual referral to magistrates of "prisoner petitions challenging conditions of confinement." *See* 28 U.S.C. § 636(b)(1)(B). Not only was the statutory language at issue in *Bronson* substantially identical to that under consideration here, but the precise question to be decided was the same as that now before the Court: whether an allegation of a specific episode of misconduct is a claim concerning conditions of confinement.

The *Bronson* Court explicitly rejected the notion advanced by respondent here and by the Court of Appeals below that "prisoner petitions should be divided into subcategories[,]" holding instead "that Congress intended to authorize the nonconsensual reference of all prisoner petitions to a magistrate." *Bronson*, 500 U.S. at 139. The Court in *Bronson* endorsed *Preiser's* "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *Id.* at 141. The Court held further that its "description in *Preiser* of the latter category unambiguously embraced the kind of single episode cases

that [the inmate's] construction would exclude." *Id.* at 142. There is simply no conceivable reason -- and certainly none has been offered by the respondent -- why *Bronson's* holding should not apply in the present case.

Bronson is particularly forceful as precedent in the present context because Congress employed strikingly similar language to advance strikingly similar goals in both the Magistrate's Act and the PLRA. As with the PLRA, a "central purpose of the 1976 amendment to the Magistrate's Act was to .... to assist federal judges 'in handling an ever-increasing caseload.'" *Bronson*, 501 U.S. at 142-43 (quoting S. Rep. No. 94-625, p. 2 (1976)); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995)(statement by co-sponsor Senator Hatch); *see also Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988)(noting that statutory language should be interpreted consistently with language from similar statute serving similar purpose); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 552 (1987)(same).

Further undermining the respondent's position is this Court's decision in *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991). In *Wilson*, this Court rejected as having no Eighth Amendment significance the very distinction relied upon by the Court of Appeals, i.e., between specific acts directed at individuals and long-term conditions or conditions broadly affecting the larger inmate population. Significantly, the Court emphasized that "specific acts or omissions directed at individual prisoners" were "conditions of [their] confinement, whether or not the deprivation is inflicted upon everyone else." *Id.* at 299 n. 1.

This Court's decisions in *Preiser*, *Bronson*, and *Wilson* are also important for their temporal relationship to the passage of Section 1997e(a). When Congress passed Section 1997e(a) in 1996, requiring exhaustion of administrative remedies in actions "with respect to prison conditions," it did so against a backdrop of this Court

having construed essentially identical language from the Magistrates Act in *Bronson* just five years earlier. That judicial backdrop also included the Court having employed similar language both in applying the federal *habeas corpus* statutes -- 8 U. S. C. §§ 2241 and 2254 – in *Preiser* and in discussing the *mens rea* requirement for Eighth Amendment claims in *Wilson*. The Court can "certainly presume ... when Congress selected this language, our elected representatives were familiar with [the Court's] recently announced opinions concerning prisoner petitions." *Bronson*, 500 U.S. at 140; *see also Booth*, *supra*, 121 S.Ct. at 1825 (presuming that Congress was aware of the Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), concerning exhaustion of administrative remedies when it passed Section 1997e(a)). More generally stated, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbot*, 524 U.S. 624, 645 (1998)(*citing Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)). By selecting the very language this Court has consistently used, it can be assumed, therefore, that Congress in passing Section 1997e(a) intended a construction of the phrase "action ... with respect to prison conditions" consistent with this Court's decisions in *Preiser*, *Bronson*, and *Wilson*.

In sum, the cases relied upon by respondent simply have no bearing on the question now before the Court. In distinguishing excessive force claims from conditions of confinement claims in *Hudson* and *Farmer*, the Court painted a fine point with a narrow brush. Conversely, in *Preiser* and *Bronson*, the reasoning of which this Court endorsed in *Wilson*, the Court employed a far broader brush to make the much more fundamental gate-keeping determination about whether and when certain inmate

claims can be brought to the district court. Because section 1997e(a) requires a court to make a similar preliminary, gate-keeping distinction regarding inmate claims, *Preiser*, *Bronson* and *Wilson* are determinative. Those decisions compel the conclusion that prisoner claims alleging single instances of unconstitutional conduct, including those alleging excessive force, are "actions ... with respect to prison conditions" for purposes of Section 1997e(a).

B. THE COURT NEED NOT INTERPRET THE PHRASE "ACTION ... WITH RESPECT TO PRISON CONDITIONS" TO IMPLY AN EXCLUSION OF EXCESSIVE FORCE CLAIMS IN ORDER FOR THAT LANGUAGE TO RETAIN ITS PLAIN MEANING AND PURPOSE

Respondent argues that that the limiting language of Section 1997e(a), "...with respect to prison conditions," is rendered meaningless if exhaustion is required in all inmate complaints. This argument fails on several levels. First, it is counterintuitive to assume, as respondent's argument necessarily implies, that in passing Section 1997e(a) – "an obviously broader exhaustion requirement" – Congress actually intended to narrow the exhaustion requirement. *See Booth*, 151 S.Ct. at 1825. Second, as discussed above, the term "action ... with respect to prison conditions" simply incorporates the reasoning of *Bronson*, *Preiser*, and *Wilson* to exclude prisoner petitions challenging the fact or duration of confinement. There was no need to apply 1997e(a) to those sorts of petitions, as they are already subject to independent exhaustion requirements. *See Preiser*, 411 U.S. at 498-499. Finally, the limiting language of 1997e(a) has the obvious and sensible effect of excusing exhaustion of claims preceding or entirely unrelated to an inmate's incarceration. For example, there

would be no point in requiring exhaustion of prison grievances in cases seeking civil damages for false arrest and malicious prosecution against arresting officers and prosecutors. Nor would it make sense to require exhaustion in a federal bankruptcy filing.

Respondent makes a related argument that interpreting "action ... with respect to prison conditions" to exclude excessive force cases is inconsistent with its plain meaning. The Court in *Bronson* has already rejected precisely this argument, noting that while the phrase "'challenging conditions of confinement,' when viewed in the isolation, would not [under the most natural reading] include suits seeking relief from isolated episodes on unconstitutional conduct[,]" a claim of excessive force nevertheless concerns conditions of confinement. *Bronson*, 500 U.S. at 139, *quoting* 28 U.S.C. § 636(b)(1)(B). As this Court has noted, if an individual prisoner is deprived of a constitutional right, "that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else." *Wilson*, 501 U.S. at 299 n.1 (emphasis added).[1/]

[1/] At pages 11-12 of his brief, the respondent uses a fictional dialogue to argue the point that "prison conditions" cannot naturally be understood to include excessive force. Indeed, the point could just as easily be made that *excluding* excessive force claims from the meaning of "action...with respect to prison conditions" deprives that phrase of its most natural meaning. Under respondent's approach, the following conversation would be perfectly natural:

Inmate Joe: Bill, how are you finding the conditions in prison?

Inmate Bill: The conditions are fine, Joe, no complaints at all.

Inmate Joe: But, I thought you'd been beaten severely by a guard?

Inmate Bill: Well yes, but I thought you were asking about prison conditions.

C. THE APPROACH THE RESPONDENT ADVOCATES AND THE COURT OF APPEALS ADOPTED IMPOSES BURDENS ON DISTRICT COURTS THAT UNDERMINE THE BASIC PURPOSES OF THE PLRA

As discussed above, the Court's decisions have emphasized that inmate claims under 42 U.S.C. § 1983 are to be categorized in a manner that is easy for district judges to apply, avoids collateral litigation, and otherwise reduces burdens on the courts. This is in perfect harmony with Congress' overarching goals in enacting the PLRA. The Court of Appeals' definition of "action ... with respect to prison conditions" as excluding "single or momentary matters" directly contravenes the PLRA's purposes and this Court's admonitions by creating uncertainty and increasing the work of the District Courts. Indeed, even in the short time since the Court of Appeals' decision in this case, the detrimental effects of its ruling are manifest.

In *Bronson*, this Court made clear that assigning prisoner cases to just two broad categories -- those challenging the fact or duration of confinement itself and those challenging the conditions of confinement, including excessive force cases -- "avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases." *Bronson*, 500 U.S. at 143. The Court noted further that identifying petitions challenging conditions of confinement in the manner now employed by the Court of Appeals "would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.*; *see also Wilson*, 501 U.S. at 300-01 (rejecting as defying "rational implementation" a short-term/one-time v. continuing/long-term method of classifying Eighth Amendment claims, noting that "apart from the difficulty of

determining the day or hour that divides the two categories (Is it the same for all conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing.")

Respondent seeks to assure the Court that no such difficulties are presented under the facts of this case. *See* Respondent's Brief at 16-17. Of course, the Court of Appeal's ruling was not limited to the facts of this case, but rather announced a general exclusion from the exhaustion requirement of "single or momentary matters." *See Nussle*, 224 F.3d at 101. More fundamentally, respondent's argument ignores the allegations of his own complaint, which asserts that his assault was just one part of a "prolonged and sustained pattern of harassment and intimidation by corrections officers[.]" *See* Complaint, J.A. 49, ¶ 9. It is difficult to imagine a clearer example of the line-drawing problem highlighted in *Bronson* and *Wilson*.

Perhaps the most persuasive arguments against the Court of Appeals' construction of 1997e(a) are provided by that court's own post-*Nussle* rulings, which have dramatically expanded the exclusions from the PLRA's exhaustion requirement beyond excessive force claims and created the very confusion and collateral litigation this Court has warned against in *Bronson* and *Wilson*. This is because the Court of Appeals has not merely excluded from the exhaustion requirement cases alleging "isolated sadistic acts of violence," as respondent suggests. The Court of Appeals has now clarified that exhaustion is only required where allegations concern "circumstances affecting everyone in the area" and where "the challenged conduct ...was either clearly mandated by a prison policy or undertaken pursuant to a systemic practice." *Marvin v. Goord*, 255 F.3d 40, 42-43 (2d Cir. June 19 2001); *see also Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001), *petit. cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001). Indeed, since *Nussle*, the Second Circuit Court of Appeals

has excused exhaustion in cases in which inmates allege: denials of their access to mail, a violation of their religious freedom and deliberate indifference to medical needs; *Marvin*, 255 F.3d at 42-43; unconstitutional drug testing procedures; *Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001); and retaliatory conduct; *Lawrence v. Goord*, 238 F.3d at 185.[2/]

The Court of Appeals has itself had difficulty applying its PLRA exhaustion jurisprudence, having been forced to remand at least two cases for further proceedings to determine if exhaustion is required. *See, e.g., Royster v. United States*, 2001 U.S. App. LEXIS 7249 (2d Cir. April 16, 2001)(vacating dismissal of claim of denial of access to legal documents and remanding for further proceedings in light of *Nussle* and *Lawrence*); *Martin*, 255 F.3d at 43 (vacating dismissal of claims of denial of legal mail, interference with religious practice, and deliberate indifference to medical needs for further proceedings in light of *Nussle* and *Lawrence*). The Court of Appeals has also expressly reserved the question inevitably created by the post-*Nussle* decisions of "whether exhaustion is required if the challenged conduct is undertaken pursuant to a prison policy which vests discretion in correctional employees to act or not act[.]" *Id.* at 43 n. 2. Adding further confusion, the Second Circuit has yet to offer any guidance to district courts on how mixed claims -- claims

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2/ In fact, the Second Circuit Court of Appeals is so hostile to the notion of PLRA exhaustion that, even after this Court rejected futility as an exception to the exhaustion requirement in *Booth v. Churner*, 121 S.Ct. 1819, 1825 n. 6, it continues to instruct district courts to determine whether "in the context of [a] request for preliminary injunctive relief, exhaustion under the PLRA is required when the remedy sought ... is available in the administrative context but, because of exigencies of the situation, the remedy may be ineffective[.]" *Marvin*, 255 F.3d at 43.

alleging single incidents as part of, or in addition to, systemic or long-lasting constitutional violations -- like respondent's, should be handled.

Exemplifying the confusion created by *Nussle* and its progeny is the Court of Appeals' decision in *Neal v. Goord*, 2001 U.S. App. Lexis 21456, * 11 (2d Cir. Oct. 4, 2001). In *Neal*, the inmate alleged that he had been singled out for denial of medical treatment, an allegation presumably sufficient to excuse exhaustion under *Nussle* and its progeny. The Court of Appeals held: "Taken to its logical conclusion, plaintiff's argument would ultimately preclude almost all prisoner complaints from falling under the exhaustion requirement. Since most prisoners file suits regarding an alleged deprivation suffered individually -- as opposed to litigating claims on behalf of an entire prison population -- were we to adopt the standard advanced by plaintiff, it would render § 1997e(a) a nullity." *Id.* at * 11-12. This statement rephrases the line-drawing problem created by *Nussle* and highlighted by this Court in *Bronson* and *Wilson*. However, having recognized the inherent difficulties created by *Nussle* and progeny, the Court of Appeals in *Neal* did nothing to clarify its PLRA exhaustion jurisprudence. To the contrary, the *Neal* decision further complicated the exhaustion analysis in cases challenging the application of general policies to particular inmates, requiring district courts to scrutinize complaints for allegations that the inmate received treatment that was "different and more particularized than ... generally received by other prisoners." *Id.* at *12-13. [v]

[v] Curiously, the *Neal* Court affirmed dismissal for failure to exhaust without remanding for further factual development, in direct contradiction to what it had done in *Marvin*, also a prisoner case alleging inadequate medical care. *Neal*, 2001 U.S. App. LEXIS 21456, * 10 (acknowledging with regard to the issue of remand that "[i]n other cases where we have reviewed district court decisions issued prior to *Lawrence* and *Nussle*, we have adopted different

Specifically, district court within the Second Circuit must now make the following determinations before enforcing 1997e(a)'s exhaustion requirement:

1. whether the challenged circumstance[s] affected one inmate or everyone in the area;
2. whether the challenged circumstance[s] were momentary or enduring;
3. whether the challenged circumstance[s] were clearly mandated by policy;
4. whether the challenged circumstance[s] were undertaken pursuant to a systemic practice;
5. whether the remedy sought is available in the administrative context;
6. if the remedy is available, whether there are exigencies that might cause the remedy to be ineffective, and
7. if the inmate is challenging a general policy or practice, whether the inmate received treatment different and more particularized than generally received by other prisoners.

These questions are, of course, more easily stated than answered, potentially requiring significant discovery

approaches."); *see also Giano*, 250 F.3d at 150-150 (holding without requiring further proceedings that challenge to drug testing as applied to plaintiff must be exhausted). The Court of Appeals has justified the discrepancy between remanding in *Marvin* and failing to do so in *Giano*, yet another case relating to medical procedures, on the basis that Giano clearly had effective remedies available to him but the record in *Marvin* did not permit such a conclusion. *See Neal* 2001 U.S. App. Lexis 21456, * 10. Given that *Booth* has foreclosed any effectiveness inquiry regarding administrative remedies, this explanation is plainly inadequate to dispel the mounting confusion created by the Court of Appeals in this area.

and fact-finding. Thus, far from easing the burdens created by inmate lawsuits as intended by Congress in passing the PLRA, *Nussle* and its progeny have grafted layer upon layer of complexity onto what could and should be a simple inquiry under Section 1997e(a).[4]

D. RESPONDENT'S REMAINING ARGUMENTS LACK MERIT

Respondent's remaining arguments also lack merit. His first argument is that, because excessive force is unconstitutional, it simply cannot fall within the definition of a prison condition. *See* Respondent's Brief at 3-6. This argument is a masterpiece of circularity. Practically every prisoner petition alleges the violation of one or more federal constitutional rights. It cannot possibly follow, therefore, that because a prisoner alleges a constitutional violation, even a serious one, his complaint does not concern a "prison condition" and is not subject to exhaustion. Nor is there any merit to the suggestion that the PLRA requires district courts to classify and manage excessive force claims differently than other claims asserted in an action under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985)(requiring uniformity of treatment for all claims asserted under 42 U.S.C. § 1983, regardless of constitutional right at issue, for purposes of statute of limitations). In addition, respondent apparently fails to appreciate that *Nussle* and its progeny have the effect of requiring inmates alleging long-term, systemic patterns of excessive force to exhaust administrative remedies.

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[4] Not only has the Court of Appeals created complexity where none is necessary, it has also laid the groundwork for truly absurd results. Presently, an inmate alleging a brief, relatively minor assault by a rogue corrections officer may proceed directly to federal court, while an inmate alleging systemic, prolonged and severe brutality may not.

In a similar vein, respondent argues that including excessive force claims within the ambit of Section 1997e(a) would render the defense of qualified immunity a redundancy. *See* Respondent's Brief at 19-20. In particular, respondent argues that "qualified immunity would be applicable in every case in which the force used was indeed a condition of confinement, that is, standard or widespread within the prison or approved by administrators." *Id.* at 20. The respondent has gotten well ahead of himself and the Court. The questions now before this Court are whether excessive force is a prison condition, and whether it was appropriate for the Court of Appeals to define prison conditions to include only practices that are standard or widespread within the prison and/or approved by administrators. The defense of qualified immunity is simply irrelevant in the present context. The PLRA's exhaustion requirement has no bearing at all on the eventual availability of qualified immunity. Section 1997e(a) exhaustion, unlike qualified immunity, does not provide a substantive defense against liability or require any judicial determinations of the reasonableness of a defendant's conduct, but rather simply concerns what the prisoner must do before the district court will entertain his lawsuit.

CONCLUSION

For the foregoing reasons, as well as the arguments asserted in petitioners' opening brief and in the briefs of the *amici*, this Court should reverse the judgment of the Court of Appeals and remand this case to that court with directions to affirm the District Court's dismissal.

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No. 00-853

In the Supreme Court of the United States

CORRECTION OFFICER PORTER, ET AL., PETITIONERS

v.

RONALD NUSSLE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) (Supp. V 1999), requires an inmate to exhaust available administrative remedies before filing an action alleging a use of excessive force by a correction officer.

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In the Supreme Court of the United States

No. 00-853

CORRECTION OFFICER PORTER, ET AL., PETITIONERS

v.

RONALD NUSSLE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a) (Supp. V 1999), requires an inmate to exhaust available administrative remedies before filing an action alleging a use of excessive force by a correction officer. The United States has a substantial interest in the resolution of that question. Pursuant to its authority to manage federal prisons, the Federal Bureau of Prisons (BOP) has adopted an administrative remedy program through which inmates may seek review of issues relating to their confinement. See 28 C.F.R. 542.10 *et seq.* Moreover, inmates frequently name BOP officials as defendants in actions arising from conditions of confinement in federal correctional institutions. See *e.g. Royster* v. *United States*,

No. 00-0185, 2001 WL 388051 (2d Cir. Apr. 16, 2001), petition for cert. pending, No. 01-100 (filed July 16, 2001). The court's decision in this case will affect both the efficacy of BOP's administrative remedy program and the conduct of litigation against BOP officials.

STATEMENT

1. At the time of the events in question, respondent was confined at the Cheshire Correctional Institution in Cheshire, Connecticut (CCI). Pet. App. A3. In June 1999, respondent filed suit in federal district court, alleging that correction officers at CCI subjected him to a sustained pattern of harassment and intimidation because of his perceived friendship with the Governor of the State of Connecticut. *Ibid.* Respondent specifically alleged that, on or about June 15, 1996, two named correction officers (petitioners), together with other unknown correction officers, placed him against a wall outside his cell, and then struck him with their hands, kneed him in the back, and pulled his hair. *Ibid.* Respondent further alleged that petitioners threatened to kill him if he reported the beating. *Ibid.* Respondent claimed that petitioners' actions constituted cruel and unusual punishment in violation of the Eighth Amendment, a violation of substantive due process, and an assault under state law. *Ibid.* Pursuant to 42 U.S.C. 1983, respondent sought compensatory and punitive damages for the injuries that he allegedly sustained. Pet. App. A3.

CCI has a grievance system for resolving prisoner complaints. J.A. 5-18. Under that procedure, an inmate may file a grievance relating to "[i]ndividual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure," and any matter "relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction." J.A. 8. Respondent did not file a grievance concerning the matters set forth in his complaint. Pet. App. A29.

Petitioners moved to dismiss respondent's complaint for failure to exhaust available administrative remedies as required by the exhaustion provision of the PLRA. Pet. App. A4. That provision directs that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. V 1999).

The district court granted petitioner's motion and dismissed respondent's complaint without prejudice. Pet. App. A22-A30. It rejected respondent's contention that the exhaustion requirement does not apply to excessive force claims. The court explained that "[t]he use of excessive force by correctional officers falls into the category of 'prison conditions,'" *id.* at A28, and that "[c]reating an exception for excessive force claims would circumvent the Congressional purpose of weeding out frivolous claims before they are filed in federal court," *id.* at A29.

2. The court of appeals reversed the district court's judgment, Pet. App. A1-A21, holding that the PLRA's exhaustion provision "does not apply to allegations of particular instances of excessive force or assault by prison employees," *id.* at A2. Relying on a dictionary definition of the term "conditions," the court of appeals concluded that the phrase "prison conditions" in the exhaustion provision refers to "circumstances affecting everyone in the area affected by them, rather than single or momentary matters, such as beatings or assaults." *Id.* at A9 (citation and internal quotation marks omitted).

The court of appeals concluded that the definition of "prison conditions" in the section of the PLRA addressed to prospective relief that courts may award also supported its

interpretation of the exhaustion requirement. Pet. App. A9-A12. The court noted that the definition includes two categories: "conditions of confinement" and "the effects of actions by government officials on the lives of persons confined in prison." *Id.* at A10 (quoting 18 U.S.C. 3626(g)(2) (Supp. V 1999)). The court concluded that the first category "is no more apt to include particular instances of assault or excessive force than the reference to 'prison conditions' in § 1997e(a) itself." *Ibid.* As to the second category, the court concluded that "such awkward language would not, ordinarily, be used to describe such incidents." *Id.* at A11. The court further concluded that, in light of the background and purposes of the prospective relief provisions, the second category's use of the phrase "government officials" refers to "administrative and policymaking officials," *id.* at A13, not to "lower level government employees, such as corrections officers," *id.* at A15.

The court of appeals also relied on this Court's holding in *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992), that a malicious use of force constitutes cruel and unusual punishment without proof of serious harm, while proof of such harm is necessary to prove other Eighth Amendment claims. Pet. App. A17. The court viewed that distinction as "equally applicable here," because it believed that Section 1997e(a) filters through the exhaustion provision only "claims that may be frivolous as to subject matter." *Ibid.* Finally, the court concluded that, as an exception to the general rule of non-exhaustion in Section 1983 cases, the PLRA's exhaustion requirement should be construed "narrowly." *Ibid.*

SUMMARY OF ARGUMENT

The PLRA's exhaustion requirement applies to actions that challenge particular instances of alleged misconduct as well as actions that challenge practices that affect the prison population generally. An inmate challenging a particular instance of alleged excessive force therefore must exhaust available administrative remedies before filing suit.

The text of the exhaustion provision makes clear that it applies to *all* actions that challenge prison conditions; there is no exception for challenges to prison conditions that affect only a single inmate or that are of brief duration. Nor can such a limitation be derived from the plain meaning of the phrase "prison conditions," as the court of appeals believed. When an individual inmate is placed in isolation, denied a specific medical procedure, or subjected to a use of force, that is a "prison condition" for him, regardless of its duration or whether that condition is inflicted on others.

This Court's decisions confirm that the phrase "prison conditions" includes particular instances of alleged misconduct. In *Preiser* v. *Rodriguez*, 411 U.S. 475, 498 (1973), and *Wilson* v. *Seiter*, 501 U.S. 294 (1991), the Court used the phrases "conditions of confinement" and "prison conditions" to refer to particular instances of alleged misconduct. In *McCarthy* v. *Bronson*, 500 U.S. 136, 142 (1991), the Court interpreted the phrase "conditions of confinement" in the magistrate referral statute to encompass a single episode of excessive force. Moreover, all the rationales for the PLRA's exhaustion requirement apply with full force to claims alleging excessive force or challenging other individual incidents.

The court of appeals interpreted the PLRA's exhaustion requirement in a manner contrary to the overall thrust of the PLRA. Having adopted an exhaustion requirement in order to help reduce the crushing burden that prison lawsuits impose on courts, Congress could not have intended for there to be extensive proceedings simply to determine whether a claim must be exhausted. In addition, the pre-PLRA exhaustion provision contained numerous limits and exceptions, but it extended to all actions challenging state prison conditions, including isolated incidents. The PLRA eliminated the constraints on exhaustion and dramatically

expanded the number of claims governed by a strict exhaustion requirement. It is highly implausible that the Congress that adopted a significantly broader exhaustion requirement simultaneously dramatically cut back on its scope. In fact, numerous statements made during the course of Congress's consideration of the PLRA show that the exhaustion requirement applies to all prison conditions—isolated incidents and recurring practices alike.

The separate definition of prison conditions for purposes of the PLRA's procedures for certain injunctions confirms the broad reach of the PLRA's exhaustion requirement. Both halves of the definition of "prison conditions" in 18 U.S.C. 3626(g) include particular instances of alleged misconduct. When read in light of the Court's decisions in *Prieser*, *Bronson*, and *Wilson*, the phrase "conditions of confinement" includes particular instances of alleged misconduct. The phrase "the effects of actions by government officials on the lives of persons confined in prison" is even better suited to capture particularized misconduct, such as uses of excessive force.

The Court's holding in *McMillian* that a malicious use of force is cruel and unusual without proof of serious harm, while other Eighth Amendment claims require such proof, has no relevance here. The standards for proving a particular claim have no bearing on whether it is appropriate to require an inmate to raise that claim in a prison grievance process before filing suit. Nor should the PLRA's exhaustion requirement be construed narrowly in order to give maximum effect to Section 1983's general rule of non-exhaustion. The PLRA's exhaustion requirement addresses Section 1983 actions specifically and is part of a comprehensive set of measures designed to address the extraordinary problems posed by prisoner lawsuits. It represents a deliberate and dramatic departure from prior law. It is therefore inappropriate to construe the PLRA's exhaustion requirement narrowly.

ARGUMENT

AN ACTION CHALLENGING A PARTICULAR INSTANCE OF ALLEGED EXCESSIVE FORCE IS AN ACTION WITH RESPECT TO "PRISON CONDITIONS" WITHIN THE MEANING OF THE PLRA'S EXHAUSTION REQUIREMENT

The PLRA's exhaustion requirement directs that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. V 1999). The court of appeals in this case held that actions challenging "particular instances" of alleged excessive force by prison guards are not actions "with respect to prison conditions" within the meaning of Section 1997e(a), and that inmates can therefore bring such claims without exhausting available administrative remedies. Pet. App. A7-A8.

In subsequent cases, the Second Circuit has made clear that its exception to the exhaustion requirement is not limited to excessive force claims. The Second Circuit has explained that the exhaustion requirement applies when an inmate challenges "aspects of prison life affecting the entire prison population," *Lawrence* v. *Goord*, 238 F.3d 182, 185 (2001), or conduct that is "clearly mandated by a prison policy or undertaken pursuant to a systematic practice," *Marvin* v. *Goord*, No. 99-0325, 2001 WL 686838, at *1 (June 19, 2001) (per curiam), but that it does not apply to any case in which an inmate challenges "particularized instances" of alleged misconduct. *Lawrence*, 238 F.3d at 186; *Marvin*, 2001 WL 686838, at * 1; see also *Royster* v. *United States*,

No. 00-0185, 2001 WL 388051, at *1-*2 (2d Cir. Apr. 16, 2001), petition for cert. pending, No. 01-100 (filed July 16, 2001); *Giano* v. *Goord*, 250 F.3d 146, 150 (2d Cir. 2001).

That reading of the PLRA's exhaustion requirement is incorrect. As four courts of appeals have held, the exhaustion requirement applies equally to actions that challenge particular instances of alleged misconduct and those that challenge practices that affect the prison population generally. *Smith* v. *Zachary*, No. 99-4084, 2001 WL 723010 (7th Cir. June 28, 2001); *Higginbottom* v. *Carter*, 223 F.3d 1259 (11th Cir. 2000); *Freeman* v. *Francis*, 196 F.3d 641 (6th Cir. 1999); *Booth* v. *Churner, C.O.*, 206 F.3d 289 (3d Cir. 2000), aff'd on other grounds, 121 S. Ct. 1819 (2001).

A. The Text Of The Exhaustion Provision Includes Actions That Challenge Particular Instances Of Alleged Misconduct

The text of the exhaustion provision directs that "[n]o" action may be brought "with respect to prison conditions" absent the exhaustion of available administrative remedies. 42 U.S.C. 1997e(a) (Supp. V 1999). By its terms, the PLRA's exhaustion requirement applies to *all* actions that challenge prison conditions; there is no exception for challenges to prison conditions that affect only a single inmate or that last for only a brief period of time.

Nor can such a limitation be derived from the plain meaning of the phrase "prison conditions," as the court of appeals believed. Pet. App. A9. That phrase undoubtedly encompasses prison practices that affect prison life for all inmates. But it also encompasses specific actions directed to particular inmates. When an individual inmate is placed in isolation, or denied requested medical care or access to a particular document, or endures a use of force, that is a "prison condition" for him, regardless of its duration or whether everyone else in the prison experiences the same conditions.

This Court's decisions in *Preiser*, *Bronson*, and *Wilson* all support that conclusion. In *Preiser*, the Court held that inmates may challenge the "conditions of their confinement" under 42 U.S.C. 1983, but that an inmate may challenge "the fact or duration of his physical confinement" only by filing a petition for a writ of habeas corpus. The Court gave as examples of challenges to conditions of confinement inmate actions complaining of: (1) the denial of the right to purchase religious publications, (2) the confiscation of legal materials, and (3) placement in solitary confinement as a disciplinary measure. *Preiser*, 411 U.S. at 498-499. Those examples "were all challenges to specific instances of unconstitutional conduct." *Bronson*, 500 U.S. at 142. Although the PLRA uses the phrase "prison conditions," rather than "conditions of confinement," that minor difference in phraseology is not significant. Indeed, the Court in *Preiser* used the two phrases interchangeably. Compare 411 U.S. at 498 ("The respondents place a great deal of reliance on our recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement.") with *id.* at 499 ("This is not to say that habeas corpus may not also be available to challenge such prison conditions."). *Preiser* therefore establishes that prison conditions include not only broad policies that affect the entire prison population, but also specific actions directed at particular inmates.

Bronson reinforces that conclusion. In *Bronson*, the Court held that a statute that authorized the referral to magistrates of "prisoner petitions challenging conditions of confinement" (500 U.S. at 137) applied to a prisoner petition alleging a single episode of excessive force. *Id.* at 139-144. Relying in significant part on *Preiser*, and Congress's presumed familiarity with that decision, the Court rejected the inmate's contention that the phrase "'conditions of confinement' includes continuous conditions and excludes isolated

incidents." *Id.* at 139. The Court explained that *Preiser* had described two broad categories of prisoner actions—"those challenging the fact or duration of confinement itself," and "those challenging the conditions of confinement," and *Preiser*'s "description * * * of the latter category unambiguously embraced the kind of single episode cases that petitioner's construction would exclude." *Id.* at 140-141.

Wilson is equally persuasive on that point. There, the Court held that inmates challenging conditions of confinement must show a culpable state of mind in order to establish an Eighth Amendment violation. In reaching that conclusion, the Court relied on the holdings in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), and *Whitley* v. *Albers*, 475 U.S. 312 (1986), that inmates alleging a deprivation of adequate medical care and the use excessive force during a riot must demonstrate a culpable state of mind. The *Wilson* Court rejected the concurring opinion's effort to distinguish those cases on the ground that they did not involve "conditions of confinement," but rather "specific acts or omissions directed at individual prisoners." 501 U.S. at 299 n.1. The Court stated that "if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else." *Ibid.* The Court further explained that "[u]ndoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a 'condition of confinement,' and the other is not." *Ibid.* Like the Court in *Preiser*, the Court in *Wilson* used the phrase "conditions of confinement" interchangeably with the phrase "prison conditions." Compare the passage quoted above with *id.* at 299-300 ("Petitioner concedes that this is so with respect to some claims of cruel and unusual prison conditions.") (emphasis omitted) and *id.* at 300 ("The long duration of a cruel prison condition may

make it easier to establish knowledge and hence some form of intent.") (emphasis omitted).

To be sure, the phrase "prison conditions" does not invariably or inescapably encompass particular instances of misconduct. The context in which that phrase is used may suggest that it has a narrower meaning. For example, in *Bronson*, the Court cited 42 U.S.C. 3769a(b), 3769b(a)(1) as an example of a statute that *may* use the phrase "conditions of confinement" to refer to "ongoing conditions." 500 U.S. at 142 & n.3. That statute requires state governments to develop a "plan for . . . improving conditions of confinement" as a precondition to receiving federal funds to "reliev[e] overcrowding [and] substandard conditions." The use of the phrase in the context of a precondition for an ongoing funding program may suggest a focus on broader conditions affecting the inmate population as a whole. See also *Hudson* v. *McMillian*, 503 U.S. 1, 8-9 (1992) (discussed at pp. 25-26, *infra*). But *Preiser*, *Bronson*, and *Wilson* make clear that, absent contextual limitations of that kind, the phrase "prison conditions" includes particularized conduct. Moreover, to the extent context informs the meaning of the term "prison conditions," the overall context of the PLRA supports a broad rather than a narrow construction of that term in the PLRA's exhaustion requirement. See pp. 12-20, *infra*.

Rather than interpreting the PLRA's exhaustion provision in light of *Preiser*, *Bronson*, and *Wilson*, the court of appeals derived the "plain meaning" of "prison conditions" from *Webster's Third New International Dictionary* (*Webster's*) 473 (1961), which defines "conditions" as "attendant circumstances," or an "existing state of affairs." Pet. App. A9. Even that definition of "conditions" unmodified, however, does not support the court of appeals' interpretation. A particular instance of misconduct, such as a use of excessive force, is an "attendant circumstance" of an in-

mate's confinement—it is connected to, and a consequence of, confinement. See *Webster's* 140 (1993) (definition of "attendant": (3) "accompanying, connected with, or immediately following as consequential"). Ultimately, however, the question at issue here does not depend on the meaning of the term "conditions" unmodified. Instead, it depends on the meaning of the phrase "prison conditions" as used in the PLRA's exhaustion requirement. When viewed against the backdrop of *Preiser*, *Bronson*, and *Wilson*, as well as the broader purposes of exhaustion and the PLRA, that phrase includes particular instances of misconduct.

B. The Exhaustion Of Claims Challenging Particular Instances Of Alleged Misconduct Directly Advances The Purposes Of The PLRA's Exhaustion Requirement

Interpreting the phrase "prison conditions" to include particular instances of misconduct directly advances the purposes of the PLRA's exhaustion requirement. Cf. *Bronson*, 500 U.S. at 142-143. Those purposes are to (1) give prison authorities the opportunity to resolve problems within the prison without judicial intervention, (2) help reduce the volume of prison litigation in federal courts, and (3) develop the underlying facts in a way that facilitates litigation in the event a case ends up in court. *Booth* v. *C.O. Churner*, 121 S. Ct. 1819, 1823 (2001); see *McCarthy* v. *Madigan*, 503 U.S. 140, 144-146 (1992).*

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* See also 141 Cong. Rec. 35,624 (1995) (Rep. LoBiondo) (exhaustion requirement will "provide the opportunity for early resolution of the problem," "reduce the intrusion of the courts into the administration of the prisons," and "provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner"); *id.* at 14,573 (Sen. Kyl) ("An exhaustion requirement is appropriate for prisoners given the burden that their cases place on the Federal court system, the availability of administrative remedies, and the lack of merit of many of the claims."); *id.* at 14,570 (Sen. Dole) (noting "an alarming explosion in the number of lawsuits filed by State and Federal prisoners"—"from 6,600 in 1975 to more than 39,000 in 1994"); *id.* at 26,553 (Sen. Hatch) (noting that the "vast majority" of the 39,000 non-habeas suits filed by inmates in federal court "are completely without merit," and that "[t]he crushing burden" of the suits "makes it difficult for courts to consider meritorious claims").

Requiring an inmate to exhaust a claim challenging a particular instance of alleged misconduct furthers each of those purposes. Unlike broad challenges to institutional policies, most isolated incident claims, including virtually all excessive force claims, involve deviation from the institution's stated policy. Accordingly, it makes particular sense to require exhaustion, which will give prison officials notification of the violation and an opportunity to correct it. For example, a prison institution has a strong interest in resolving an excessive force claim. If the claim is legitimate, a prison institution has an overriding interest in learning about it at an early stage, so that it can take immediate steps to discipline the abusive guard. *Freeman*, 196 F.3d at 644. While prison institutions typically advance their interest in receiving timely notification by requiring inmates to file administrative grievances within a short period after the incident, *e.g.* J.A. 11 (grievance must be filed within 30 days of the occurrence of discovery of the cause of the grievance); 28 C.F.R. 542.14 (grievance must be filed with 20 days following the date on which the basis for the grievance occurred), applicable statutes of limitation can give inmates years to file suit.

Excessive force claims are also well-suited to administrative resolution. A prison institution may remedy a legitimate claim of excessive force by disciplining the officer involved, retraining the officer, transferring the inmate to a different area of the prison, or issuing a decision that the inmate's complaint is meritorious and the guard's conduct should not be repeated. See *Smith*, 2001 WL 723010, at *3.

Such measures may well satisfy the complaining inmate and eliminate his desire to pursue federal court litigation. *Booth*, 121 S. Ct. at 1823. Alternatively, factual development of the issue and a written decision may persuade the inmate that there is no merit to his claim and dissuade him from filing suit. *Ibid.* In either event, the administrative process reduces the volume of litigation in federal court.

When litigation cannot be avoided, exhaustion of an excessive force claim can better prepare the parties for litigation on the issue and expedite resolution of the matter in court. *Booth*, 121 S. Ct. at 1823. Excessive force claims can be "factually intense," and the administrative process may, "at a minimum," develop the "basics of who-did-what-to-whom." *Smith*, 2001 WL 723010, at *2.

Other particular instance claims, such as claims involving a particular instance of retaliation, or claims involving a particular instance of inadequate medical care, implicate the policies of exhaustion to the same degree. In those cases as well, institutions have an interest in learning about a deviation from institution policy quickly; internal proceedings can remedy the problem or clarify the facts in a way that dissuades the inmate from filing suit; and factual development can assist the parties in presenting the issues that must be resolved by a court.

The Second Circuit nonetheless concluded in *Lawrence*, the second in its series of exhaustion cases, that the purposes of exhaustion are not implicated by particular instance claims. The court reasoned that the purpose of exhaustion is to give prison institutions a chance to change their policies, a purpose "not served when a practice is aimed at one specific inmate rather than the prison population as a whole." 238 F.3d at 186. In subsequent cases, the Second Circuit has repeated that limited rationale for the exhaustion requirement. *Royster*, 2001 WL 388051, at *1; *Marvin*, 2001 WL 686838, at *1.

The Second Circuit has provided no basis for its view that the purpose of the PLRA's exhaustion requirement is limited to giving prison institutions a chance to change their policies. The PLRA responded to a perceived flood of prison litigation, not just suits aimed at changing overall policies. More broadly, exhaustion requirements are typically designed to serve a variety of purposes, including reducing the volume of federal court litigation and facilitating the development of the facts should a dispute reach court. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972); *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969).

Moreover, the Second Circuit is mistaken in its view that isolated incidents can never lead to the reassessment of institutional policies. Institutions may view a particular guard's use of excessive force as a symptom of "systemic problems, including poor hiring procedures, insufficient training and supervision, or an inadequate procedure for responding to prison riots or insubordinate behavior by prisoners." *Smith*, 2001 WL 723010, at *2. A report of a particular incident may well prompt a reassessment of those broader policies.

Exhaustion of challenges, whether incident-specific or implicating broader policies, also gives the courts the benefit of institutional expertise. Courts are "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974). The proper response to prison grievances falls squarely within the expertise of prison officials, and, in general, courts owe deference to the solutions chosen by those officials. *Bell* v. *Wolfish*, 441 U.S. 520, 547 n.29 (1979).

C. An Exception To The Exhaustion Requirement For Claims Challenging Particular Instances Of Alleged Misconduct Would Generate Wasteful Litigation

The difficulty of distinguishing between actions challenging particular instances of alleged misconduct and actions challenging systematic prison practices provides yet another reason for rejecting the court of appeals' interpretation. The very effort to determine which cases fall into which category will generate substantial additional work for the courts. Requiring all claims arising from incarceration to be exhausted avoids that difficulty and further advances the PLRA's goal of reducing the amount of judicial resources devoted to prisoner claims.

The exhaustion cases decided by the Second Circuit in the wake of its decision in this case provide an early indication of the additional litigation that the Second Circuit's rule would generate. While the Second Circuit had no difficulty classifying a retaliation claim as a particular instance claim, it has remanded for district courts to consider in the first instance whether the following claims must be exhausted: a claim that an inmate was denied access to his legal documents, *Royster*, 2001 WL 388051, at *2; a claim that an inmate's mail was seized, *Marvin*, 2001 WL 686838, at *1-*2; a claim that a directive promulgated by prison employees abridged an inmate's right to freedom of religion, *ibid*; and a claim that an inmate was denied adequate medical care when prison employees failed to allow him to obtain root canal surgery from a dentist, *ibid.* The Second Circuit has also left open for future litigation "the question of whether exhaustion is required if the challenged conduct is undertaken pursuant to a prison policy which vests discretion in correctional employees to act or not act, *e.g.*, a policy providing that an employee should perform some act if it is 'reasonably' warranted by the circumstances." *Id.* at *3 n.2.

The complaint in this case illustrates that even an excessive force claim may resist easy characterization. Respondent's complaint centers on one specific incident of alleged excessive force. Pet. App. A3. But his complaint also alleges that correction officers subjected him to a sustained pattern of harassment and intimidation because of his perceived friendship with the Governor of the State of Connecticut. *Ibid.* Thus, respondent's complaint, like many inmate complaints, fairly can be characterized as challenging both a systematic practice and a particular instance of alleged misconduct.

The Second Circuit's interpretation thus invites substantial collateral litigation on whether a claim must be exhausted. Having adopted an exhaustion requirement in order to help reduce the crushing burden that prison lawsuits impose on courts, Congress could not have intended for there to be extensive pleadings, hearings, and possibly trials simply to determine whether a claim must be exhausted.

This Court has previously recognized that the attempt to separate particular instance claims from other prison condition claims provokes wasteful litigation. In *Bronson*, the Court noted that its holding that all prison petitions may be referred to magistrates "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [an] exception for single episode cases." 500 U.S. at 143. The Court added that such an exception "would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Ibid.* Many prison petitions, the Court explained, "could fairly be characterized as challenging both ongoing practices and a specific act of alleged misconduct." *Id.* at 143-144.

Similarly, in *Wilson*, the difficulty of drawing a distinction between "short-term" or "one-time" prison conditions and "continuing" or "systematic" conditions played a significant role in the Court's rejection of that distinction as a basis for determining whether proof of a culpable state of mind is required to establish an Eighth Amendment violation. 501 U.S. at 300. The Court explained that "[a]part from the difficulty of determining the day or hour that divides the two categories (Is it the same for *all* conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing." *Id.* at 301. The Court also "wonder[ed] whether depriving all the individual prisoners who are murderers would suffice; or all the individual prisoners in Cellblock B." *Id.* at 299 n.1. The Court concluded that the proposed distinction "defies rational implementation," *id* at 301, and is not only "unsupportable in principle but unworkable in practice," *id.* at 299 n.1. The practical considerations discussed in *Bronson* and *Wilson* are equally applicable here.

D. Congress Changed The Exhaustion Provision To Broaden Its Scope, And Creating An Exception For Actions Challenging Particular Instances Of Alleged Misconduct Would Contravene That Purpose

Before the PLRA amended Section 1997e(a), a district court had discretion to require a state inmate to exhaust a claim brought pursuant to 42 U.S.C. 1983 if the court determined that exhaustion would be "appropriate and in the interests of justice," and if the State afforded remedies for the claim that were "plain, speedy, and effective." 42 U.S.C. 1997e(a)(1) (1994). Before ordering exhaustion, a court was also required to determine that the state procedures satisfied minimum standards of fairness and effectiveness. 42 U.S.C. 1997e(a)(2) (1994). In addition, rather than ordering a dismissal of the case pending exhaustion, a

court's only option was to continue a case pending exhaustion for a period of not more than 180 days. 42 U.S.C. 1997e(a)(1) (1994). Nonetheless, that exhaustion requirement applied to all actions filed by inmates under Section 1983 and therefore unambiguously included actions challenging particular instances of alleged misconduct. 42 U.S.C. 1997e(a) (1994).

In the PLRA, Congress made substantial changes in Section 1997e(a) to expand the scope and ease the application of the exhaustion requirement. In place of the previous version, Congress substituted a broad and firm mandate that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law" by an inmate "until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. V 1999). That provision (1) eliminates the requirement that state remedies must be "plain, speedy, and effective," (2) eliminates the requirement that administrative remedies must satisfy minimum standards of fairness and effectiveness, (3) eliminates a court's discretion to waive exhaustion when it would not be "appropriate" or "in the interests of justice," (4) requires dismissal of an action for failure to exhaust, rather than a continuance for not more than 180 days, and (5) extends exhaustion to claims brought under any federal law. See *Booth*, 121 S. Ct. at 1824-1825 & n.5.

It is "highly implausible" that the Congress that adopted "an obviously broader exhaustion requirement" intended to permit the many inmates who challenge particular instances of alleged misconduct to "skip the administrative process" and go directly to federal court. 121 S. Ct. at 1825. That is particularly true in light of the original version of Section 1997e(a)'s unambiguous application to actions challenging particular instances of alleged misconduct. If the court of appeals' interpretation were correct, it would mean that at the same time that Congress widely expanded the scope of

the exhaustion requirement, it simultaneously dramatically cut back on it.

As the court of appeals noted (Pet. App. A6), the PLRA inserted the phrase "with respect to prison conditions" into Section 1997e(a), and some meaning must be given to that addition. But that phrase can be given meaning without undermining the underlying purpose of the exhaustion requirement's revisions. The phrase "with respect to prison conditions" serves at least one limited but important function: it eliminates the new mandatory exhaustion requirement for claims that concern pre-incarceration incidents, such as an action alleging excessive force by an arresting officer, or an action alleging that a pre-incarceration employer engaged in discrimination in violation of Title VII. In a provision requiring mandatory exhaustion of prison grievance procedures, it would have made little sense to have required exhaustion of such claims. There is no comparable reason for Congress to have excluded actions challenging particular instances of alleged misconduct that occur while an inmate is confined. To the contrary, a principal purpose of prison grievance procedures is to address claims of that kind.

E. The Legislative History Does Not Support An Exception For Particular Instances Claims

The legislative statements made during the course of Congress's consideration of the PLRA also support a broad reading of the exhaustion requirement. In discussing the prisoner lawsuits that prompted the PLRA, the proponents referred to the numerous suits involving isolated incidents, including: the failure to provide sufficient locker space; a defective haircut by a prison barber; the failure of prison officials to invite an inmate to a pizza party; the service of chunky peanut butter rather than creamy; the denial of the use a Game Boy; the issuance of Converse shoes rather than

Reebok or L.A. Gear; a clean-up of a flooded cell that resulted in pinochle cards getting wet; and a search of a cell in which clean and dirty clothes were mixed together. 141 Cong. Rec. at 14,570 (Sen. Dole); *id.* at 26,548 (Sen. Dole); *id.* at 26,553 (Sen. Hatch); *ibid.* (Sen. Kyl); *id.* at 27,042 (Sen. Hatch).

The proponents did not refer directly to excessive force claims. In discussing the need for the PLRA, however, its sponsors could hardly be expected to discuss all the claims that would be subject to exhaustion. In pressing their case for a change in the law, the sponsors understandably selected the most egregious examples of lawsuits filed by inmates. In addition, while no sponsor referred to excessive force claims directly, one of the sponsors referred to the propensity of inmates to file cruel and unusual punishment claims, 141 Cong. Rec. at 14,570 (Sen. Dole), a category that includes excessive force claims. Furthermore, an opponent of the legislation pointed out that excessive force claims, like the claims discussed by the proponents, would be affected by the legislation, *id.* at 27,044 (Sen. Biden), and no proponent contradicted that assertion. Nothing in the legislative history remotely suggests that the sponsors intended to exclude excessive force or other isolated incident claims from the exhaustion requirement's coverage.

F. The Definition Of Prison Conditions In 18 U.S.C. 3626(g) (Supp. V 1999) Supports A Broad Construction of That Term In The Exhaustion Provision

The court of appeals concluded that the definition of "prison conditions" in 18 U.S.C. 3626(g)(2) (Supp. V 1999) supported its interpretation of the exhaustion requirement. Pet. App. A12-A16. That definition is included in a separate section of the PLRA addressed to limitations on prospective relief and provides that, "[a]s used in this section, * * * the term 'civil action with respect to prison conditions' means

any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. 3626(g)(2) (Supp. V 1999). The court of appeals' reliance on that definition is misplaced. To the extent it is relevant, that definition encompasses particular instances of alleged misconduct and so supports a broad reading of the PLRA's exhaustion requirement. Even if it excluded them, however, it would not affect the construction of the PLRA's separate exhaustion requirement.

1. The definition in Section 3626(g)(2) tracks the distinction drawn by the Court in *Preiser* between actions that inmates may bring pursuant to Section 1983 and actions that they may bring only by filing a petition for a writ of habeas corpus. *Preiser* used the phrase "conditions of their confinement" to describe the former category, 411 U.S. at 498, and "challenge [to] the very fact or duration of the confinement" to describe the latter, *id.* at 499. Because the Section 3626 definition "so clearly parallels" the decision in *Preiser*, it should be interpreted in accordance with that decision. *Bronson*, 500 U.S. at 142.

As previously discussed, *Preiser* used the phrase "conditions of confinement" to include particular instances of alleged misconduct. The term "conditions of confinement" in the Section 3626 definition therefore includes that class of claims as well. The decisions in *Bronson*, and *Wilson*, which adopted similar definitions of "conditions of confinement," reinforce that conclusion. See pp. 10-11, *supra*. The court of appeals concluded that the phrase "conditions of confinement" is not an "apt" way to describe particular instances of alleged misconduct. Pet. App. A10. But that assessment ignores the decisions in *Preiser*, *Bronson*, and *Wilson*. In light of those decisions, the phrase "conditions of confinement," when contrasted with "habeas corpus proceedings challenging the fact or duration of confinement in prison," is a particularly "apt" way to encompass particular instances of alleged misconduct.

2. The phrase "the effects of actions by government officials on the lives of persons confined in prison" (18 U.S.C. 3626(g)(2) (Supp. V 1999)) is even better suited than the phrase "conditions of confinement" to capture challenges to particular instances of alleged misconduct. Its evident purpose is to make doubly sure that a particular instance of alleged misconduct would not be excluded from the definition.

The court of appeals viewed that phrase as too "awkward" to capture particular instances of excessive force. Pet. App. A11. As the Third Circuit has explained, however, particular instances of excessive force affect the lives of inmates in the same way as other adverse prison conditions—"[t]hey make their lives worse." *Booth*, 206 F.3d at 295. There are undoubtedly more precise ways to describe particular instances of excessive force. But Congress had to choose a general phrase that would capture a wide variety of practices not just uses of excessive force. The phrase it selected effectively serves that purpose.

3. The court of appeals also drew on the background and purposes of Section 3626 to interpret its definition narrowly. In particular, the court concluded that, because the primary purpose of Section 3626 is to prevent courts from micromanaging prisons through broad-based decrees directed to high-ranking prison officials, the term "government officials" in Section 3626(g)(2) must refer only to "administrative and policymaking officials," Pet. App. A13, and not to "lower level government employees, such as corrections officers," *id.* at A15; see generally *id.* at A12-A15.

That construction of Section 3626 is mistaken. Congress crafted an expansive definition embracing the actions of all government officials, not just policymaking officials. Com-

pare 50 U.S.C. 403-3(b)(5) (Supp. V 1999) (limiting provision to "policymaking officials"); 18 U.S.C. 2705(a)(1)(B) (limiting provision to "supervisory official"); 42 U.S.C. 2000aa-11(a)(4) (same). Correction officers, no matter what their rank, are still "government officials." See *Crawford-El* v. *Britton*, 523 U.S. 574, 577, 581, 585 (1998). But to the extent that the specific purposes of Section 3626 are relevant, they counsel against transplanting a definition from that section that is expressly limited to defining the term "as used in this section." In other words, even if the Section 3626 definition were construed to exclude particular instances of alleged misconduct for purposes of *that Section*, it would not furnish a basis for construing the PLRA's separate exhaustion provision in the same way. *Bronson*, 500 U.S. at 142 ("the fact that Congress may have used the term 'conditions of confinement' in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act"); *United States* v. *Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1440-1443 (2001) (refusing to give the phrase "wages paid" the same interpretation in the "discrete taxation and benefits eligibility contexts" when the concerns that animated treatment of backpay in the benefits context had "no relevance to the tax side"); see *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 783 & n.12 (2000) (refusing to apply a section-specific definition of "person" to a different section, where the definition departed from the usual meaning of that term); compare *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-240 (1989) (adopting a definition applicable to a different section when there was "no reason to suppose that Congress had in mind * * * any more constrained a notion").

G. Neither *McMillian* Nor The General Rule That Claims Under Section 1983 Need Not Be Exhausted Supports The Court Of Appeals' Interpretation

The court of appeals cited two additional considerations in support of its interpretation—the holding in *McMillian* that excessive force claims have a different standard of proof from other cruel and unusual punishment claims, and the general rule that Section 1983 claims do not have to be exhausted. Pet. App. A16-A17. Neither provides a basis for excluding particular instance claims from the scope of the PLRA's exhaustion requirement.

1. In *McMillian*, the Court held that in order to establish that a malicious and sadistic use of excessive force violates the Eighth Amendment, it is not necessary to show that serious harm has resulted. 503 U.S. at 7-11. The Court distinguished excessive force claims from other Eighth Amendment claims, which require such a showing. *Id.* at 8-9. Referring to the other Eighth Amendment claims as "conditions-of-confinement" claims and "medical needs" claims, *id.* at 9, the Court gave the following explanation for the distinction:

> In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident.

Id. at 9 (citation omitted).

McMillian shows that it is linguistically possible to use the phrase "conditions of confinement" in a way that excludes instances of excessive force and deprivations of medical needs, a point previously noted. See pp. 10-11, *supra*. The question here, however, is not whether it is linguistically possible to use the phrase "prison conditions" in that way. Instead, the question is whether that is what Congress in-

tended in the specific context of the PLRA's exhaustion provision. As we have discussed, the factors bearing on that question overwhelmingly establish that the phrase "prison conditions" in the exhaustion provision encompasses particular instances of misconduct, including particular instances of excessive force. Nothing in *McMillian* suggests otherwise. Indeed, *McMillian*'s holding that a malicious use of excessive force is cruel and unusual without proof of serious harm, while other Eighth Amendment claims require such proof, has no relevance here. The standards for proving a particular claim in court have no bearing on whether it is appropriate to require an inmate to raise that claim in a prison grievance process before filing suit.

The court of appeals nonetheless concluded that *McMillian* is significant in the present context because the purpose of exhaustion is to filter out claims that are "frivolous as to subject matter," and *McMillian* establishes that excessive force claims do not meet that description. Pet. App. A17. The text of the exhaustion provision, however, applies to any action that challenges prison conditions, not just those that challenge conditions that are "frivolous as to subject matter." Compare 42 U.S.C. 1997e(c)(2) (Supp. V 1999) (authorizing dismissal of any claim that "is, on its face, frivolous").

Nor is there any other basis for the court of appeals' gloss on the statute. Requiring exhaustion of claims that are frivolous as to subject matter undeniably advances the purposes of the exhaustion requirement. But, as we have discussed (pp. 12-15, *supra*), exhaustion requirements apply and serve beneficial purposes for legitimate, as well as frivolous, claims. Moreover, claims that are not frivolous as to subject matter can still be frivolous. *McMillian* requires proof of malice, but not serious harm. There is no reason to think that allegations of malice by prisoners can never be frivolous. Because there is no basis for limiting the exhaustion requirement to claims that are frivolous as to subject matter, *McMillian* is inapposite here.

2. The court of appeals similarly erred in concluding (Pet. App. A17) that the PLRA's exhaustion requirement should be construed narrowly in order to give "full effect" to the general rule of non-exhaustion in actions brought under 42 U.S.C. 1983. In several cases, this Court has construed an exception to a statute narrowly when a broader construction would defeat the primary policy of the statute. *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995); *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989); *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). The PLRA's exhaustion requirement, however, is part of a comprehensive set of measures designed to address the extraordinary problems posed by prisoner lawsuits; it applies expressly to actions under Section 1983 and to actions under any federal law; and it represents a deliberate and dramatic departure from prior law. Moreover, it was a deliberate effort to expand the exhaustion requirement to cover more claims. It is therefore inappropriate to begin with a presumption that Congress intended for the PLRA's exhaustion requirement to be construed narrowly. *Miller* v. *French*, 530 U.S. 327, 340-341 (2000) (refusing to apply a presumption against interpreting statutes to reduce equitable discretion when it was clear that Congress was trying to reduce equitable discretion).

In any event, the primary purpose of Section 1983 is "to provide a remedy for the violation of federal rights," *Crawford-El*, 523 U.S. at 595, and interpreting the exhaustion requirement to apply to actions challenging particular instances of alleged misconduct does not defeat that purpose. Inmates can continue to obtain a remedy for a violation of their federal rights; they simply need to raise their claims in the administrative process first.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CORRECTION OFFICER PORTER, *et al.*,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of *Amici Curiae* The States of New York, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Washington in Support of Reversal

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The States of New York, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Washington respectfully submit this brief as *amici curiae* urging reversal of the decision below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The statutory exhaustion requirement at issue in this case mandates exhaustion of administrative remedies in all actions by prisoners "brought with respect to prison conditions." Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996) ("PLRA"), codified at 42 U.S.C. § 1997e(a). In enacting the PLRA, which expanded the scope of the exhaustion requirement and made exhaustion mandatory, Congress significantly enhanced the ability of *amici* States to use their prison grievance procedures as a tool for safe and effective prison administration, as well as to identify and discourage frivolous prisoner actions.

Prison grievance procedures provide timely feedback to state officials about problems that arise in correctional facilities. They enable administrators at the facilities to take remedial action before isolated instances, taken together, lead to frustration among the prison population or to a pattern of inappropriate conduct by correctional officers, potentially triggering prisoner unrest or disturbances. The grievance procedures also allow state officials to create factual records of any disputes that may eventually be litigated in court, and to filter out meritless inmate claims, thereby reducing the States' costs of defending against frivolous prisoner litigation.

By dramatically curtailing the scope of the exhaustion requirement, the decision below, if not reversed by this Court, will adversely affect the efficacy of *amici* States' prison grievance procedures.

SUMMARY OF THE ARGUMENT

The PLRA's exhaustion requirement applies to an "action . . . brought with respect to prison conditions" under federal law by a prisoner. 42 U.S.C. § 1997e(a). The court below construed this phrase to apply only to systematic practices that affect the prison population as a whole, holding that any inmate alleging excessive force or other misconduct by prison officials that is directed at a particular individual need not exhaust prison grievance procedures pursuant to section 1997e(a).

The Second Circuit's distinction between misconduct affecting particular individuals and practices affecting the prison population as a whole makes little sense in light of the purposes of the exhaustion requirement. In strengthening the exhaustion requirement through enactment of the PLRA, Congress enhanced the states' ability to use administrative grievance procedures to resolve prisoners' grievances, reduce frivolous litigation, and develop the factual record for future litigation. Exhaustion serves these purposes regardless of whether a prisoner's grievance concerns an isolated instance of alleged misconduct by a prison official or a prison's systematic practice. Indeed, interpreting section 1997e(a) to permit prisoners to immediately litigate in court any action alleging individualized misconduct without first exhausting administrative grievance procedures would significantly deny the benefits afforded to *amici* States by the PLRA.

Nor do the statute's text and legislative history provide any support for the narrow reading adopted by the Second Circuit. The phrase "action . . . brought with respect to prison conditions," construed in its most natural manner, does not exclude prisoner claims of individualized misconduct by correctional officials. Moreover, two other subsections of section 1997e confirm that this phrase should be read broadly.

Those provisions (sections 1997e(c) and 1997e(f)) permit sua sponte dismissal of frivolous actions and direct that pretrial proceedings shall be conducted via telecommunications technology without removing the inmate from his correctional facility. Prohibiting courts and parties from exercising these options in all prisoner actions alleging individualized conduct by a prison official — for example, an allegation that a guard improperly denied an inmate access to recreation time on a specific date — would make no sense. The PLRA's legislative history also supports a broad construction of the exhaustion requirement. It demonstrates that in enacting section 1997e(a), Congress intended to broaden the scope of the exhaustion requirement to cover *Bivens* actions brought by federal prisoners, not to narrow its applicability as suggested by the court below.

ARGUMENT

I. The Second Circuit's Interpretation of Section 1997e(a) Undermines Congress' Purposes in Requiring Exhaustion

The exhaustion requirement at issue in this case, as amended by the PLRA, provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The Second Circuit below held that the phrase "action . . . brought with respect to prison conditions," which delineates the scope of section 1997e(a), "does not encompass [actions alleging] particular instances of excessive force or assault." *Nussle v. Willette*, 224 F.3d 95, 100 (2d Cir. 2000). Relying upon the dictionary definition of the word "conditions" — which, according to the court,

"denotes 'attendant circumstances' or an 'existing state of affairs' " — the Second Circuit concluded that "the use of the term 'prison conditions' in § 1997e(a) would appear to refer to 'circumstances affecting everyone in the area affected by them,' rather than 'single or momentary matters,' such as beatings or assaults, that are directed at particular individuals." *Id.* at 101 (internal quotation marks omitted). The Second Circuit also found support for its interpretation in another provision of the PLRA, 18 U.S.C. § 3626, which uses the phrase "civil action with respect to prison conditions" in limiting the type of relief that inmates may obtain in court.

In a series of cases following *Nussle*, the Second Circuit has made clear that its interpretation of the phrase "action . . . brought with respect to prison conditions" excludes not only claims of excessive force or assault but all claims alleging particularized instances of misconduct. *See Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001) (permitting unexhausted claims in prisoner actions alleging "particularized instances of retaliatory conduct directed against an inmate"), *petition for cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001) (No. 00-1619); *accord Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001); *see also Marvin v. Goord*, No. 99-0279, 2001 U.S. App. LEXIS 13586, at *5 (2d Cir. June 19, 2001) (vacating dismissal of unexhausted claims of denial of access to legal mail, violation of freedom of religion, and deliberate indifference to serious medical needs, and remanding for re-examination in light of *Nussle* and *Lawrence*); *Royster v. United States*, No. 00-0185, 2001 U.S. App. LEXIS 7249 (2d Cir. April 16, 2001) (vacating dismissal of claim of denial of access to legal documents and remanding for reconsideration in light of *Nussle* and *Lawrence*).

Indeed, recent Second Circuit decisions have characterized *Nussle* and its progeny as requiring exhaustion of prison grievance procedures pursuant to section 1997e(a)

only if the challenged conduct on the part of correctional employees "was either clearly mandated by a prison policy or undertaken pursuant to a systematic practice." *Marvin*, 2001 U.S. App. LEXIS 13586, at *5; *see also Royster*, 2001 U.S. App. LEXIS 7249, at *5.[1] Thus, application of the exhaustion requirement has apparently become the exception, rather than the rule.

By narrowly construing section 1997e(a), the Second Circuit has severely undermined the purposes of the exhaustion requirement. Exhaustion of administrative grievance procedures has several benefits: the opportunity for an agency to correct its own mistakes in a timely manner, the filtering out of frivolous claims, and the development of a record for further litigation. Congress' decision in amending section 1997e(a) to expand the scope of the exhaustion requirement and make it mandatory furthers each of these goals.

First, administrative grievance procedures allow states to fairly and efficiently resolve prisoner grievances. When a prisoner's complaint has merit, the prison has an "opportunity to correct its own mistakes." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *see also McGee v. United States*, 402 U.S. 479, 484 (1971) ("[A] strict exhaustion requirement tends to ensure that the agency had additional opportunities to discover and correct its own errors, and thus may help obviate all occasion for judicial review." (internal quotation marks omitted)); *McKart v. United States*, 395 U.S. 185, 195 (1969) ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."). "In fact, the administrative process may make

1. The Second Circuit has left open even "the question of whether exhaustion is required if the challenged conduct is undertaken pursuant to a prison policy which vests discretion in correctional employees to act or not act." *Marvin*, 2001 U.S. App. LEXIS 13586, at *5 n.2.

negotiation more effective and may serve to reduce the scope of litigation should some, if not all, of the inmate's grievances be resolved internally." *Smith v. Zachary*, No. 99-4084, 2001 U.S. App. LEXIS 14339, at *10 (7th Cir. June 28, 2001).

This opportunity for early identification of grievances is particularly critical in correctional facilities, where a quick resolution of problems reduces the likelihood of prisoner unrest. *See id.* ("Requiring prompt notice and exhaustion also gives prison officials an opportunity to address a situation internally, which in a case like this could involve relocating [a guard], firing guards, hiring new ones, or providing additional training and supervision to staff.") (citation omitted).

The need for such notice is no less for claims of individualized misconduct than for claims regarding prison-wide practices. In New York, for example, the Department of Corrections uses prisoner grievance data — much of which involves claims of alleged misconduct directed at a specific inmate — to identify and address problems at particular facilities or system-wide. Those problems may be the result of activities that are, in fact, contrary to law or prison policy, or simply routine practices that are a source of irritation to inmates and may eventually escalate into prison unrest. *See* State of New York Department of Correctional Services, *Inmate Grievance Program: Annual Report* (2000); *see also Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999) ("Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.")

Second, the exhaustion requirement enables the administrative grievance process itself to filter out some frivolous claims. *See* 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (statement of Senator Dole) (referring to exhaustion requirement as one of several PLRA provisions that "would go a long way to take

the frivolity out of frivolous inmate litigation"); *id.* S14626 (daily ed. Sept. 29, 1995) (similar statement). For example, upon review and rejection of their frivolous claims by an administrative body, some prisoners will not proceed further simply because they received an opportunity to voice their complaints. Other prisoners may not file a civil action in court based on grievances rejected as frivolous for fear of losing in forma pauperis status for other complaints with more merit. *See* 28 U.S.C. § 1915(g). By reducing the number of frivolous claims that ultimately reach the courts, the PLRA's enhanced exhaustion requirement lowers the enormous costs the States must bear when prisoners litigate their grievances. *See id.* S14413 (daily ed. Sept. 27, 1995) (statement of Senator Dole) ("The National Association of Attorneys General estimates that inmate civil rights litigation costs the States more than $81 million each year. Of course, most of these costs are incurred defending lawsuits that have no merit whatsoever.").

In outlining the types of actions that might be deemed frivolous, Congress did not adopt the Second Circuit's distinction between claims affecting the prison population as a whole and individualized claims of misconduct. In fact, Senator Dole's explanation of the type of prisoner actions that motivated the PLRA clearly *includes* individualized claims:

> According to Enterprise Institute scholar Walter Berns, the number of "due-process and cruel and unusual punishment" complaints filed by prisoners has grown astronomically — from 6,600 in 1975 to more than 39,000 in 1994. These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison

> employee, and yes, being served chunky peanut butter instead of the creamy variety.

141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (introducing S. 1279)[2]; *see also id.* at S14418 (statement by co-sponsor Senator Hatch) ("The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims. In one frivolous case in Utah, an inmate sued demanding that he be issued Reebok or L.A. Gear brand shoes instead of the Converse brand being issued. In another case, an inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet."); *id.* (statement by co-sponsor Senator Kyl) (referring to prisoner lawsuits filed "in response to almost any perceived slight or inconvenience," including "being denied the use of a Gameboy video game").

As is evident from these examples, the types of frivolous prisoner lawsuits contemplated by Congress were hardly limited to lawsuits challenging prison policies or systematic practices. Excluding all other claims from the scope of the exhaustion requirement would significantly diminish the cost-savings that Congress anticipated in enacting section 1997e(a).

Third, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *Madigan*, 503 U.S. at 146; *see also*

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2. The PLRA amendment of section 1997e(a) was introduced in the Senate, *see* Prison Litigation Reform Act of 1995, S. 1279, 104 Cong. § 3 (1995); 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995), and subsequently included in H.R. 2076, an appropriation bill, *see* H.R. Conf. Rep. No. 104-378, at 166-67 (1995), that the President vetoed, *see* 141 Cong. Rec. H15166-15167 (daily ed. Dec. 19, 1995). That provision, along with the rest of the PLRA, was then inserted into H.R. 3019, a revised budget appropriation bill, *see* H.R. Conf. Rep. No. 104-537, at 68-80 (1996), which ultimately became law, *see* Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

Weinberger v. Salfi, 422 U.S. 749, 765 (1975); *McKart*, 395 U.S. at 194. Even where a state administrative process does not involve formal fact-finding, the "paperwork generated by the grievance process might assist a court somewhat in ascertaining the facts underlying a prisoner's claim more quickly than if it has only a prisoner's complaint to review." *Madigan*, 503 U.S. at 155.

Congress amended the exhaustion requirement in part because it believed that the administrative grievance process would "foster better-prepared litigation once a dispute did move to the courtroom, even absent formal fact-finding." *Booth v. Churner*, 121 S. Ct. 1819, 1823 (2001); *see also Smith*, 2001 U.S. App. LEXIS 14339, at *12-13 ("The [PLRA's exhaustion] requirement is not designed to stop prisoners from filing suits, but rather to facilitate the litigation process. In particular, the development of the factual record may help rather than hinder prisoners, enabling them to succinctly present their cases."); 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (explaining that "new administrative exhaustion language" in H.R. 2076 "will provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner"). That purpose is served whether the dispute at issue concerns systematic practices or individualized instances of misconduct.

In light of the purposes advanced by the exhaustion requirement, the distinctions in the Second Circuit's interpretation of section 1997e(a) are illogical. Administrative grievance procedures can resolve some grievances, filter out frivolous complaints, and produce a more developed factual record for future litigation, *regardless* of whether prisoners bring claims of excessive force, assault, or other individualized misconduct, or bring claims referring to "circumstances affecting everyone in the area affected by them." *Nussle*, 224 F.3d at 101 (internal quotation marks omitted). Nor are

administrative grievance procedures any less effective where the challenged conduct was *ultra vires*, as opposed to conduct mandated by prison policy. Indeed, administrative grievance procedures may be particularly important where the challenged conduct violates the clear mandates of prison policy, because meritorious grievances may alert prison administrators to problems that call for especially prompt action.

II. Section 1997e(a) Does Not Exclude Claims of Excessive Force or Other Isolated Episodes of Misconduct

A. The Text of Section 1997e(a) and Other Subsections of the Same Provision Support a Broad Construction of the Exhaustion Requirement.

The text of section 1997e(a), which mandates exhaustion in any "action . . . brought with respect to prison conditions," does not, on its face, admit of any exclusions. The Second Circuit's interpretation of this provision to exclude actions alleging excessive force, retaliatory conduct, and any other singular episode of misconduct directed at a particular inmate thus lacks foundation in the language of the statute itself.

Two other subsections of the same section 1997e confirm that the phrase "action . . . brought with respect to prison conditions" in subsection 1997e(a) should not be read to exclude claims of particularized misconduct. Subsection (c) of 1997e permits a district court to dismiss sua sponte "any action brought with respect to prison conditions" if it determines that the action is frivolous. 42 U.S.C. § 1997e(c)(1). Subsection (f) of 1997e provides that pretrial proceedings in "any action brought with respect to prison conditions" shall be held at the prison via telephone, video conference, or other telecommunications technology so that an inmate need not be physically transferred to participate. *Id.* § 1997e(f)(1).

Notwithstanding the Second Circuit's reliance on the dictionary definition of the word "conditions," *see Nussle*, 224 F.3d at 101, it is not plausible that Congress intended to exclude any action alleging particularized misconduct from the scope of these procedural provisions. It is counterintuitive and illogical to suggest that Congress would permit sua sponte dismissal of frivolous actions alleging conduct affecting the entire prison population (such as prison overcrowding), but not of frivolous actions alleging assault or excessive force. Similarly, there is no reason why Congress would require that a prisoner participate in pre-trial proceedings via telecommunications technology — thereby reducing the burden associated with physically transferring that prisoner for the proceeding — but hinge the application of that requirement on what acts the prisoner chooses to challenge in his complaint. Because the phrase "action . . . brought with respect to prison conditions" should be given a consistent meaning throughout the section, *see Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 159 (1993), this Court should not construe Congress' use of that phrase in section 1997e(a) as evincing its intent to exclude claims involving non-systematic episodes of misconduct.

B. In Amending the Exhaustion Requirement Through the PLRA, Congress Intended to Expand, Not Restrict, Its Scope.

The legislative history of the PLRA indicates that in amending the pre-existing exhaustion requirement, Congress intended only to remedy this Court's prior decision confining the scope of section 1997e(a) to section 1983 cases, not to limit its applicability in the manner suggested by the Second Circuit.

Before the PLRA's enactment in 1996, the exhaustion requirement of section 1997e(a) covered "any action brought pursuant to section 1983 of this title [*i.e.*, 42 U.S.C. § 1983] by an adult convicted of a crime confined in any jail, prison,

or other correctional facility." 42 U.S.C. § 1997e(a)(1) (1994). Section 1983 itself permitted a prisoner to challenge "the conditions of his prison life," but not the fact or duration of the confinement itself. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

Subsequently, this Court held in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that this exhaustion requirement did not apply to actions brought by prisoners against the United States pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Madigan*, 503 U.S. at 150. The Court explained that it was "significant that Congress, in enacting § 1997e, stopped short of imposing a parallel requirement in the federal prison context." *Id.* As a result, inmates confined in federal prisons (who would appropriately bring a *Bivens* action rather than a section 1983 suit to challenge an aspect of their prison conditions), were not subject to the exhaustion requirement.

The PLRA's legislative history demonstrates that in amending section 1997e(a), Congress sought to remedy the effects of *McCarthy* by mandating exhaustion for *Bivens* actions brought by inmates in federal prisons. As Representative LoBiondo explained:

> The real problem with [*Bivens*] cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a Bivens actions for money damages only. *McCarthy v. Madigan*, 112 S.Ct. 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something.
>
> . . .

> I am pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the Bivens issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court.

141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995). By adding to section 1997e(a) the phrase "any other Federal law," Congress intended to statutorily override *Madigan* and to extend section 1997e(a) to cover federal prisoners' actions under *Bivens*.

By also amending section 1997e(a) to cover only those actions "brought with respect to prison conditions," Congress intended to ensure that claims which arise wholly outside the prison context — but are nonetheless brought by a prisoner — are not subject to the exhaustion requirement. Absent this additional clarifying language, the new phrase "any other Federal law," when combined with Congress' decision to make exhaustion mandatory, would have meant that a prisoner who brought an action under federal law concerning injuries that occurred *prior* to his incarceration — such as an action alleging violation of federal employment discrimination law or misconduct by the arresting police officer[3] — would be required to exhaust prison administrative

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3. According to one study of section 1983 prisoner lawsuits disposed of in 1992 by federal district courts in nine states, six percent of the lawsuits named arresting officers as defendants. *See* Roger A. Hanson & Henry W.K. Daley, United States Department of Justice, *Challenging the Conditions of Prisons & Jails: A Report on Section 1983 Litigation* 16 (1994); *see also id.* at 17 tbl.3 (3% of prisoner actions under section 1983 raise the issue of assault by the arresting officer). "Other types of (Cont'd)

grievance procedures, even though those procedures are obviously ill-suited to resolve such claims. By adding the phrase "with respect to prison conditions," Congress made certain that such non-prison related actions would not be subject to the exhaustion requirement.

C. Section 3626 of the PLRA Confirms that the PLRA's Exhaustion Requirement Covers Particularized Episodes of Misconduct

Section 3626 of the PLRA, which restricts the authority of federal courts to order equitable relief in prisoner actions, also uses the phrase "any civil action with respect to prison conditions." Congress defined that phrase to mean

> any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2).

The Second Circuit relied on section 3626(g)(2) to support its cramped interpretation of section 1997e(a), concluding that if the two provisions can be read *in pari materia*, the definition set forth in section 3626(g)(2) does not encompass particular instances of excessive force, assault, or other misconduct directed at a particular inmate. *See Nussle*, 224 F.3d at 101-105; *see also Lawrence*, 238 F.3d at 185 ("*Nussle* read § 1997e(a) *in pari materia* with another section of the PLRA, 18 U.S.C. § 3626(g)(2). . . .").

(Cont'd)

defendants include clerks of the court, court reporters, privately retained and court appointed state trial and appellate counsel, spouses, private business persons, and the President of the United States (29%)." *Id.* at 16.

In the first place, it is not clear that section 3626(g)(2) may properly be construed *in pari materia* with section 1997e(a). Because section 3626(g) expressly limits the applicability of the definitions provided therein to terms "[a]s used in this section," 18 U.S.C. § 3626(g), Congress may not have intended to apply section 3626(g)(2)'s definition of "civil action with respect to prison conditions" to other sections of the PLRA. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-784 & n.13 (2000) (indicating that 31 U.S.C. § 3733(l)(4), which expressly defines " 'person,' '[f]or purposes of this section,' to include States," "is explicitly made inapplicable" to 31 U.S.C. § 3729 and other sections of the False Claims Act containing the term "person").

If section 3626(g)(2) is nonetheless relevant in construing section 1997e(a), it supports a broad reading of the exhaustion requirement contained in the latter provision because, contrary to the analysis by the court below, claims regarding excessive force or other particularized episodes of misconduct readily fit into either prong of section 3626(g)(2), which defines actions with respect to prison conditions as actions with respect to (1) "the conditions of confinement," or (2) "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

Although the Second Circuit found that characterizing the use of excessive force as "conditions of confinement" "clearly departs from normal, everyday use of the phrase," *Nussle*, 224 F.3d at 102, this Court has construed the term "conditions of confinement" in a similar context to include such claims. *See McCarthy v. Bronson*, 500 U.S. 136, 137, 143-44 (1991) (holding that the statutory phrase "conditions of confinement," which delineated scope of statute authorizing referral to magistrates of prisoner petitions, embraced both "a specific episode of unconstitutional conduct by prison administrators" as well as "challenges to ongoing prison conditions"); *see also Wilson v. Seiter*, 501

U.S. 294, 299 n.1 (1991) (rejecting the distinction between specific acts and conditions of confinement as impractical). Since repetition in a new statute of language previously construed by the courts "indicates, as a general matter, the intent to incorporate [the former statute's] . . . judicial interpretations as well," *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), the phrase "conditions of confinement," as used in the PLRA, is appropriately construed as consistent with *Bronson*'s interpretation of the same phrase.

The second category of actions included in section 3626(g)(2), "the effects of actions by government officials on the lives of persons confined in prison" is also easily construed to include "isolated episodes of unconstitutional conduct at the hands of prison officials," including claims of excessive force. *Booth v. Churner*, 206 F.3d 289, 296 (3d Cir. 2000), *aff'd on other grounds*, 121 S. Ct. 1819 (2001). The Second Circuit found it significant that "such awkward language would not, ordinarily, be used to describe such incidents." *Nussle*, 224 F.3d at 102. And indeed, had Congress intended to cover *only* particular instances of assault or excessive force, it is more likely to have used more specific language, such as the words "excessive force" or "assault." The broad nature of the phrase, however, coupled with Congress' failure to enumerate specific kinds of conduct, indicates that Congress intended to cover a *wide variety* of official actions that affect prisoners, including, but not limited to, excessive force and assault.

In analyzing this second prong of section 3626(g)(2), the Second Circuit also concluded that the primary purpose of section 3626 — to prevent federal courts from micromanaging prison systems — suggests that the term "government officials" in section 3626(g)(2) covers only "administrative and policymaking officials." *Nussle*, 224 F.3d at 104. But Congress knows how to specify a particular subset of government officials. *See, e.g.*, 12 U.S.C. § 3410(d) ("supervisory official of the Government authority");

18 U.S.C. § 202(a) (definition of "special Government employee"); 50 U.S.C. app. § 2160(b)(3) ("full-time salaried Government officials who are responsible for making policy decisions"). Its failure to so specify in section 3626(g)(2) indicates that it did not intend to do so. *See also Smith*, 2001 U.S. App. LEXIS 14339, at *6 ("Smith argues that the designation 'government official' does not apply to prison guards, but rather refers only to 'senior policy-making and administrative officials.' We find no basis for adding these qualifiers to the plain language of the statute.").

Nor is there any reason to conclude that, in light of section 3626's purpose, the term "civil action with respect to prison conditions" as used in that section refers only to actions "affecting large numbers of inmates." *Nussle*, 224 F.3d at 106. Section 3626 covers various kinds of equitable relief, including "[p]rospective relief in any civil action with respect to prison conditions" brought by "a particular plaintiff or plaintiffs," 18 U.S.C. § 3626(a)(1)(A). Although Congress did limit the relief available under section 3626 to cases involving large numbers of inmates in other instances, *see id.* § 3626(a)(3)(E)(i) (authorizing entry of prisoner release order only if "crowding is the primary cause of the violation of a Federal right"), it defined "prospective relief" broadly to mean "all relief other than compensatory monetary damages," *id.* § 3626(g)(7). Contrary to the Second Circuit's reasoning, this definition certainly covers a federal action brought by a prisoner who alleges a single incident of misconduct at the hands of particular prison officials and seeks *individualized* equitable relief, such as a transfer to a different correctional facility or assignment to a particular prison program.[4]

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4. The Second Circuit in *Nussle* also justified its interpretation of section 1997e(a) by relying on pre-PLRA decisions of this Court concerning the Cruel and Unusual Punishment Clause of the Eighth Amendment that "distinguish between 'excessive force' claims, on the one hand, and 'conditions of confinement' claims, on the other."

(Cont'd)

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit Court of Appeals.

(Cont'd)
Nussle, 224 F.3d at 106 (citing *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) and *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994)). Those decisions, however, do not apply in this context and thus do not support the Second Circuit's interpretation.

In *Hudson*, the Court held that the malicious use of excessive physical force against a prisoner can constitute cruel and unusual punishment even when the inmate does not suffer significant injury. The Court distinguished this feature of Eighth Amendment excessive-force claims from the fact that "extreme deprivations are required to make out a conditions-of-confinement claim" under the Eighth Amendment, *id.* at 9, motivated *solely* by the fact that contemporary standards of decency — the constitutional benchmark for analyzing what constitutes cruel and unusual punishment under the Eighth Amendment — required the Court to make this distinction, *see id.* at 11; *see also Farmer*, 511 U.S. at 835-36 (reaffirming this distinction). Because nothing in the text or legislative history of the PLRA indicates that Congress intended to import the substantive standards governing cruel and unusual punishment claims into section 1997e(a), *Hudson* and *Farmer* deserve no weight in determining the meaning of "action . . . with respect to prison conditions" in that provision.

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IN THE

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,
Petitioners,

v.

RONALD NUSSLE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether inmate excessive force claims are subject to the administrative exhaustion requirement of § 803(d) of the Prison Litigation Reform Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The administration of a state or local correctional institution is invariably a complex and difficult undertaking fraught with tension and countless occasions for friction and disagreement. As Justice Stewart wrote for the Court in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." Moreover, "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen." *Id.* at 492. As a result, "the possibilities for litigation . . . are boundless." *Id.*

Recognizing this fact, and attempting to introduce a measure of reason in response to the exponential increase in inmate litigation of recent decades, Congress enacted the Prison Litigation Reform Act of 1995. One provision of the PLRA requires inmates to exhaust state administrative remedies prior to initiating lawsuits over "prison conditions." 42 U.S.C. § 1997e(a). Contrary to the holding of every other court of appeals that has considered the issue, the court below ruled that an inmate's claim that a correction officer has used excessive force is not subject to the PLRA's exhaustion requirement because excessive force claims do not involve

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

"the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

Amici respectfully submit that the ruling of the court of appeals is not only patently erroneous, but defeats the important public policies of the Prison Litigation Reform Act. The PLRA exhaustion requirement aids not only the courts and governmental defendants, but often inmates as well. As the leading inmate litigation handbook has noted, inmates will frequently be better off if they exhaust expeditious administrative remedies prior to—and possibly in place of—initiating time-consuming and protracted litigation. *See* John Boston & Daniel Manville, *Prisoners' Self-Help Litigation Manual* 451 (3d ed. 1995) (detailing benefits to inmates from use of administrative remedies to resolve grievances).

Because of the importance of the question presented to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. In 1964, this Court first sanctioned the right of prisoners to bring suit under 42 U.S.C. § 1983 to challenge a State's alleged unconstitutional treatment while in confinement. Prison life has unique potential to foster litigation. Consequently, the number of prisoner civil rights lawsuits in federal courts thereafter burgeoned from 218 in 1966 to 41,312 in 1995.

Section 1983 plaintiffs are ordinarily not required to exhaust administrative remedies. As a result, an immense volume of inmate civil complaints flooded the federal courts. Not only did a very small percentage of these prisoner suits prove to be meritorious, but, even more important, inmates frequently represented themselves and thus were often ill-equipped to present legal arguments, proffer evidence, or conduct settlement negotiations with defense counsel.

Congress's response was to enact a series of statutes designed to encourage inmate litigants to pursue their grievances in less formal, more expeditious administrative proceedings prior to filing civil actions in federal court. These efforts began in 1980 with Section 7 of the Civil Rights of Institutionalized Persons Act (CRIPA) and culminated in the Prison Litigation Reform Act of 1995 (PLRA). Whereas Section 7 of CRIPA *encouraged* the use of administrative remedies with scant success, Section 803(d) of the PLRA *requires* the exhaustion of available administrative remedies before an inmate can file a civil action "with respect to prison conditions." 42 U.S.C. § 1997e(a).

B. With the exception of the court below, every federal court of appeals to have considered the question has held that claims of excessive force are subject to the PLRA's exhaustion requirement. These courts have relied on two principal legal theories to support that conclusion.

First, while section 803(d) does not define the class of "action[s] . . . with respect to prison conditions" that are subject to the PLRA's exhaustion requirement, the pivotal language is defined on the preceding page of the Statutes at Large. *See* PLRA § 802(g)(2), 110 Stat. 1321-70 (codified at 18 U.S.C. § 3626(g)(2)). That section states that "the term 'civil action with respect to prison conditions' means any civil proceeding. . . with respect to the conditions of confinement or *the effects of actions by government officials on the lives of persons confined in prisons. . . .*" *Id.* (emphasis added).

For reasons best known to itself, the court below found the language of section 802(g)(2) to be inapplicable to Nussle's claim that the petitioner correction officers used excessive force against him. Although the court concluded that the language of section 802(g)(2) cannot, as a matter of the niceties of English prose style, be applied to Nussle's excessive force claim, other courts have readily rejected such reasoning. As the Third Circuit held, for example, the

language of section 802(g)(2) plainly "refer[s] to civil actions ranging from excessive force. . . to actions 'with respect to'" a wide variety of other allegedly objectionable prison conditions, all of which have this in common: "They make [inmates'] lives worse." *Booth v. Churner*, 206 F.3d 289, 295 (3d Cir. 2000), *aff'd on other grounds*, 121 S.Ct. 1819 (2001).

In addition, the court of appeals' statutory analysis would have perverse results. It would require litigation over whether a case can proceed when a prisoner simultaneously sues corrections officers and higher-level prison officials. *See Procunier v. Navarette*, 434 U.S. 555, 556 (1978) (inmate suit against correctional counselors also named as defendants director of state department of corrections, warden, and assistant warden). It would likewise necessitate litigation where, as here, an inmate files a complaint that challenges both ongoing conditions and an incident of excessive force. *See* Pet. App. 24a (opinion of district court) (Nussle "alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation") (citing Compl. ¶¶ 7, 9).

Second, the judgment below is irreconcilable with this Court's analysis and holding in *McCarthy v. Bronson*, 500 U.S. 136 (1991). In *McCarthy* the Court unanimously ruled that the term "conditions of confinement" in 28 U.S.C. § 636(b)(1)(B), the statute governing the jurisdiction of U.S. magistrates, encompasses excessive force claims. Indeed, in *McCarthy* the Court rejected the very argument accepted by the court below—that "Congress used the term 'conditions of confinement'" to refer only to "ongoing situations." *See* 500 U.S. at 142.

The statutory analysis of *McCarthy* should control the outcome in this case, as other courts of appeals have held. Congress enacted the PLRA exhaustion requirement only five years after the *McCarthy* Court unanimously construed the "conditions of confinement" language of § 636(b) to encompass cases "challenging specific acts of alleged

misconduct" such as the use of excessive force at issue in that case. *See* 500 U.S. at 143. Congress had no reason to expect courts to construe the similar term "prison conditions" in the PLRA any differently. The judgment below should accordingly be reversed.

ARGUMENT

THE ADMINISTRATIVE EXHAUSTION REQUIREMENT OF THE PLRA APPLIES TO ALL PRISONER SECTION 1983 CLAIMS, INCLUDING EXCESSIVE FORCE CLAIMS

A. The High Volume Of Inmate Litigation Necessitated The Broad Exhaustion Requirement Of The PLRA

In *Cooper v. Pate*, 378 U.S. 546 (1964), this Court first sanctioned the right of prisoners to bring suit under 42 U.S.C. § 1983 to challenge a State's "alleged unconstitutional treatment . . . while in confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). An exponential increase in the volume of inmate litigation occurred in the ensuing decades, leading to the adoption of the Prison Litigation Reform Act in 1996. *See generally Booth v. Churner*, 206 F.3d 289, 298 n. 9 (3d Cir. 2000) (discussing legislative history of PLRA), *aff'd*, 121 S.Ct. 1819 (2001).

"Prison life creates the potential for an enormous number of cases under section 1983." William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits In The Federal Courts*, 92 Harv. L. Rev. 610 (1979). Ten years after *Cooper*, the Court itself acknowledged the unique potential of the prison environment to foster litigation.

> The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the

> State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Preiser, 411 U.S. at 492. Indeed, "[e]very such dispute can become a Section 1983 case." Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 611. *See also Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) ("With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population.").

The Court had previously held that Section 1983 plaintiffs are not required to exhaust state administrative remedies. *See McNeese v. Board of Ed.*, 373 U.S. 668, 674-76 (1963); *see also Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Preiser* thus recognized that "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." 411 U.S. at 494.

The *Preiser* Court nonetheless suggested that the unique nature of prison litigation warranted an exception to the general rule of non-exhaustion under Section 1983. As the Court explained,

> Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with

> the grievances of state prisoners and in a better physical and practical position to deal with those grievances.

411 U.S. at 492.

In 1980, Congress took a first step toward requiring inmates to exhaust administrative remedies by enacting Section 7 of the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 352 (1980) (formerly codified at 42 U.S.C. § 1997e). For various reasons, Section 7 failed significantly to diminish the rising volume of inmate litigation.[2] Indeed, from the year ending June 30, 1966, through the year ending June 30, 1995, the number of prisoner civil rights suits in federal court grew from 218 to 41,312.[3] In the year ending September 30, 1995, prisoner

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[2] Under former section 1997e, exhaustion of state administrative remedies was not required "unless the Attorney General ha[d] certified or the court ha[d] determined that [the remedy was] in substantial compliance with the minimal acceptable standards" of § 1997e(b). 42 U.S.C. § 1997e(a)(2) (1994). Those standards included Justice Department regulations that "provide[d] '. . . for an advisory role for . . . inmates of any jail, prison, or other correctional institution . . . in the formulation, implementation, and operation of the system." *Id.* § 1997(b)(2)(A). The version of the regulations in place in 1987 provided that " '[a]t a minimum, some employees and inmates shall be permitted to participate in an advisory capacity in the disposition of grievances challenging general policy and practices and to review the effectiveness and credibility of the grievance procedure.' " *Lewis v. Meyer*, 815 F.2d 43, 46 (7th Cir. 1987) (quoting 28 C.F.R. § 40.7(b) (1986)). The Attorney General's final set of regulations likewise required that "[t]he institution shall provide for an advisory role for . . . inmates in the operation of the grievance system." 28 C.F.R. § 40.7(b) (2000). As a result, "extremely few jurisdictions . . . attempted to win approval of their administrative remedies" under this version of § 1997e. Charles F. Abernathy, *Civil Rights and Constitutional Litigation: Cases and Materials* 235 (2d ed. 1992).

[3] *Compare* Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 611 (giving 1966 data and citing Administrative Office of the U.S. Courts, *1975 Annual Report of the Director* 207 (1975) (table 24)), *with* Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and The*

section 1983 cases comprised 16.8 percent of the civil docket of federal district courts nationwide. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1998* (Table C-2A) (available at http://www.uscourts.gov/dirrpt98/c2asep98.pdf).

This growth in prisoner section 1983 litigation "place[d] great stress on the resources of the federal courts," and in particular, "the district courts [which] face numerous practical difficulties in dealing with unrepresented litigants." Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 63 (1995). The litigation burden on both the courts and governmental defendants is frequently exacerbated by the fact that "[a] significant number of these plaintiffs proceed pro se." *Id.* According to the Judicial Conference, "[m]any [prisoner plaintiffs] are illiterate, most are unschooled in the law, and some are in need of mental health counseling." *Long Range Plan* at 64. For these reasons, "[r]elatively few . . . cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible." Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 637.

At the same time, some inmate litigants "are 'frequent filers,' having upwards of 20 cases in court at one time," and "some of these latter plaintiffs are very sophisticated and adept at pleading practices, forcing the court to continue cases even on claims without any basis in fact or law." Judicial Conference, *Long Range Plan*, at 64-65.[4] Indeed, as the Fifth

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Federal System 1122 (4th ed. 1996) (citing letter from the Administrative Office of the United States Courts to David Shapiro, Aug. 31, 1995). *See also Booth v. Churner*, 206 F.3d at 298 n.9 (discussing "the crushing burden these suits have on federal courts" and giving statistics on growth of inmate litigation).

[4] *See also* Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 635 ("Every jurisdiction seems to have one or more notorious jailhouse lawyers, who can account for as many as twenty or thirty cases filed in

Circuit observed prior to the enactment of the PLRA, "pro se civil rights litigation ha[d] become a recreational activity for state prisoners." *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988). *See also* Judicial Conference, *Long Range Plan* at 65 (some "cases are brought merely to enable a plaintiff to confer with another inmate, or to travel outside the prison for a court hearing").

An additional problem was that "the obvious purpose of some filings is to harass prison or court authorities." *Id. See also Cleavinger*, 474 U.S. at 211 (Rehnquist, J., dissenting) (prison disciplinary officials "are much more likely to be the object of harassing litigation in the absence of absolute immunity"). The Eighth Circuit likewise noted that prisoner section 1983 suits "are frequently without merit and may be maliciously motivated. An inmate may use a suit or a threat of a suit as a lever to obtain favorable treatment or a desirable work assignment." *Wycoff v. Brewer*, 572 F.2d 1260, 1266 (8th Cir. 1978).

The cumulative effect of the foregoing was, as Justice Powell put it, that "federal courts [were] often . . . converted into small-claims tribunals." *Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring); *see also Preiser*, 411 U.S. at 492. The result in many cases was to "trivialize[]" constitutional law and the role of the federal courts. *Parratt*, 451 U.S. 554 n.13 (Powell, J., concurring). Moreover, the costs and benefits of prisoner section 1983

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their own names. No one can be sure how many additional cases they may have drafted, advised, or inspired.") (footnote omitted); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 Rutgers L.J. 361, 367-68 (1998) (discussing "frequent filers," including one Missouri inmate who filed over 700 lawsuits).

litigation suggest that civil actions were almost invariably an extremely inefficient way to resolve inmate grievances.[5]

Congress ultimately responded by enacting the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321-66 (1996). Among PLRA's various provisions is Section 803(d), which amended 42 U.S.C. 1997e to read as follows:

> (a) Applicability of Administrative Remedies.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

110 Stat. 1321-71 (codified at 42 U.S.C. § 1997e(a)).

Section 803(d) amended section 1997e(a) in several significant ways. First, it makes exhaustion mandatory rather than discretionary with the court. *See Booth v. Churner*, 121 S.Ct. 1819, 1825 n.5 (2001). Second, it eliminates the requirement that the Attorney General certify or a court determine that a State's administrative remedy meets federal standards. *Compare* 110 Stat. 1321-71—1321-73 *with* 42 U.S.C. § 1997e(a)(2) & (b) (1994); *see also Booth*, 121 S.Ct. at 1825 n. 5. Finally, it requires that a prisoner exhaust "available" administrative remedies, regardless of whether

[5] During the debate on PLRA, the National Association of Attorneys General estimated the nationwide costs of defending prisoner section 1983 litigation at $81 million a year. *Criminal Oversight*, Wall St. J., June 10, 1996, at A18. On the other side of the equation, a very low percentage of prisoner section 1983 suits "result in outcomes favorable to plaintiff[s]." *Hart & Wechsler* at 1122 n.6 (noting that in one federal district court, prisoners prevailed in "fewer than 0.5%" of the cases filed) (citation omitted).

the remedy is "effective," 42 U.S.C. § 1997e(a)(1) (1994), or offers the relief sought. *Booth v. Churner*, 121 S.Ct. at 1825.[6]

B. The Court Of Appeals Erred In Holding That Respondent's Excessive Force Claim Is Exempt From The PLRA's Exhaustion Requirement

The court of appeals erred in holding that respondent Nussle's excessive force claim is not subject to PLRA's exhaustion requirement. It reasoned that while Section 803(d) "added teeth to the § 1997e(a) exhaustion provision," Pet. App. 5a, it "simultaneously" and "explicitly limited its applicability only to federal *actions that are brought 'with respect to prison conditions.'*" *Id.* at 6a (quoting 110 Stat. 1321-71) (emphasis added). While correctly observing that Section 803(d) does not define this pivotal language, *see id.* at 9a, the court of appeals dismissed the definition that Congress gave the same term, just one page earlier in the Statutes at Large, *see* 110 Stat. 1321-70, as "awkward," "elephantine" and "roundabout phraseology." Pet. App. 11a-12a.

The court of appeals thus held that Nussle's lawsuit is not an "action . . . with respect to prison conditions" because it arises out of a "'single or momentary matter' . . . that [is] directed at [a] particular individual[]." Pet. App. 9a (quoting *Booth v. Churner*, 206 F.3d at 300-01 (Noonan, J., concurring

[6] PLRA's provisions have had a substantial impact on the number of prisoner section 1983 suits. In fiscal year 2000, the federal courts experienced a "38 percent drop in state prisoner petitions involving civil rights" from fiscal year 1996 levels. *See* Administrative Office of the U.S. Courts, *Judicial Business 2000* 21 (2001) (available at http://www.uscourts.gov/judbus2000/front/2000artext.pdf). While part of the drop is likely attributable to the new filing fee requirements, *see* PLRA § 804, 110 Stat. 1321-73—1321-75 (codified at 28 U.S.C. § 1915), the PLRA's exhaustion requirement undoubtedly played a substantial role.

and dissenting).[7] In so holding, the court disregarded settled principles of statutory construction and ignored this Court's analysis in *McCarthy v. Bronson*, 500 U.S. 136 (1991), which interpreted similar statutory language as applying to a single episode of allegedly unconstitutional conduct.[8] Its holding likewise frustrates PLRA's purpose of reducing the volume of prisoner litigation. The judgment of the court of appeals should accordingly be reversed.

As just noted, section 803(d) does not define the term "action . . . with respect to prison conditions." *See* 110 Stat. 1321-71—73. This language is, however, defined on the preceding page of the Statutes at Large. *See* PLRA § 802(g)(2), 110 Stat. 1321-70 (1996). Section 802(g)(2) states that the term "'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the *effects of actions by government officials on the lives of persons confined in prison*, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* (emphasis added).

The court of appeals declined to apply the italicized language to respondent's excessive force claim for several reasons. First, it reasoned that "[t]his definition, by its own terms, only applies to 'this section,' *i.e.*, 18 U.S.C. § 3626." *Id.* at 9a. Sub-section 802(g), however, contains no such

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[7] The court of appeals also apparently overlooked the district court's finding that Nussle also "alleged that the defendants made him the target of a prolonged and sustained pattern of intimidation." Pet. App. 24a (citing Compl. ¶¶ 7, 9).

[8] The court of appeals cursorily cited *McCarthy v. Bronson*, *see* Pet. App. 12a, but at no point addressed *McCarthy*'s legal analysis. This failure is all the more remarkable given the fact that other courts of appeals, including opinions cited by the court below, relied heavily on *McCarthy v. Bronson* to support their holdings that the exhaustion requirement applies to excessive force claims. *See Booth v. Churner*, 206 F.3d at 295; *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

limitation. *See* 110 Stat. 1321-69. Rather, sub-section 802(g) states: "Definitions.-As used in this section-," *id.*, and then lists the definitions Congress thought necessary for the courts to interpret Section 802. *See id.* at 1321-70. This language does not suggest that the definitions of terms provided therein apply only to section 802.

Second, the court believed it could disregard the definition set forth in § 802(g) because it is, in the court's view, drafted in "awkward language" and "roundabout phraseology" when applied to an excessive force claim. Pet. App. 11a-12a. In so reasoning, the court disregarded the settled rule of construction that "[p]resumptively, identical words used in different parts of the same act are intended to have the same meaning." *United States Nat'l Bank of Or. v. Independent Ins. Agents*, 508 U.S. 439, 460 (1993) (citations and internal quotations omitted). While this presumption can be rebutted, *see id.*, Congress' asserted "awkwardness" in drafting is not a sufficient basis for a court to disregard this canon of construction. Moreover, the court of appeals' view that construing the phrase "effects of actions by government officials on the lives of persons confined" to include an excessive force claim would be "'a circumlocution'" that "'no one on earth, educated or uneducated, would use,'" *id.* at 11a-12a (quoting *Booth*, 206 F.3d at 302 (Noonan, J., dissenting)), is a gross exaggeration.

Contrary to the holding of the court below, every other court of appeals to consider this question has held that the PLRA exhaustion requirement applies to excessive force claims. *See Booth*, 206 F.3d at 296 n.5; *Freeman*, 196 F.3d at 643-44; *Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997). If a guard uses excessive force to quell a prison riot and causes physical injury, *see, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 316-18 (1986), no circumlocution occurs if the injury is described as "the effect[] of action[] by government officials on the lives of persons confined in prison." *See* 110

Stat. 1321-70. As the Third Circuit explained in *Booth*, whether a government official's action involves a "decision not to make basic repairs in the prison, or intentionally to deny a prisoner food, heating or medical attention[,] [a]ll of these actions affect the lives of prisoners similarly: They make their lives worse." 206 F.3d at 295. In short, the manner in which Congress defined the scope of actions subject to Section 803's exhaustion rule "'does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

The court of appeals further reasoned that the term "government officials" in Section 802(g)(2) "is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers . . . who have day-to-day contact with inmates but no administrative or policymaking authority." Pet. App. 13a. According to the court, "even to the extent that we may rely upon [Section 802(g)(2)], it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as 'government officials,' since such a reading of the term 'officials' would include just about any government employee without regard to level of responsibility or authority." *Id.* at 15a. This analysis is untenable for several reasons.

First, Congress did not define the term "government officials" in the PLRA so as to limit it to those officials with "policymaking authority." *See* 110 Stat. 1321-70. It is clear that Congress knows how to use statutory language that is clearly limited to high level officials with such authority. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 464-67 (1991) (discussing ADEA's exclusion from coverage for "an appointee on the policymaking level") (citing 29 U.S.C. § 630(f)).

Second, "lower level government employees, such as corrections officers," Pet. App. 15a, have routinely been referred to as "officials" by this Court. *See McCarthy v. Bronson,* 500 U.S. at 138 ("petitioner brought suit against various prison officials alleging that, in violation of his constitutional rights, they used excessive force when they transferred him from one cell to another"). *See also Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (stating, in suit against corrections officers, that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley*"); *id.* at 9 ("[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated"). Corrections officers have likewise been held to be government "officials" entitled to the qualified immunity accorded executive branch officials in Section 1983 suits. *See Procunier v. Navarette*, 434 U.S. 555, 556 & n.2, 560-63 (1978).

Third, construing the applicable provisions of the PLRA to require exhaustion only if the government official taking the action has policymaking or administrative authority would lead to perverse results that are contrary to one of the PLRA's fundamental purposes. It would foster substantial litigation over such issues as whether the prison official in question (for example, a prison doctor) has sufficient authority to be a "policymaker." *See, e.g., Parratt*, 451 U.S. 530 (suit against Hobby Manager); *Procunier*, 434 U.S. at 556 n.2. (suit against "correctional counselors" and "member of the prison staff in charge of handling incoming and outgoing mail"); *Hudson*, 503 U.S. at 4 (suit against supervisory corrections officer).

The court of appeals' reasoning would also require litigation to decide whether a case can proceed when a prisoner simultaneously sues corrections officers and higher-level prison officials, *see Procunier*, 434 U.S. at 556 (inmate

suit against correctional counselors also named as defendants director of state department of corrections, warden, and assistant warden), or, as here, files a complaint that challenges both ongoing conditions and an incident of excessive force. *See* Pet. App. 24a (opinion of district court) (Nussle "alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation") (citing Compl. ¶¶ 7, 9).

Moreover, precisely because corrections officers "have day-to-day contact with inmates," Pet. App. 13a, their decisions are highly likely to prompt inmate lawsuits, even when "senior policymaking or administrative officials," *id.* at 14a-15a, are not involved. It is just such decisions made by what the court of appeals called "lower level" employees involving a "'single or momentary matter[] . . . directed at [a] particular individual[]," *id.* at 9a, 13a, which are a font of inmate grievances that, absent exhaustion, will ordinarily result in lawsuits.

There is likewise no merit to the court of appeals' suggestion that Congress' concern with "frivolous suits," *id.* at 15a, "refers to subject matter, rather than to the factual merits of a claim, that if proven, would be meritorious." *Id.* at 16a. The statutory text does not support the court's view that there are classes of claims that are "frivolous" as a matter of law, while other classes of claims are not, and that only the former are subject to the exhaustion requirement. *See* § 803(d), 110 Stat. at 1321-71; *see also* § 802(g)(2), 110 Stat. at 1321-70.

Indeed, over the years, a number of "actions . . . with respect to prison conditions," section 803(d), 110 Stat. at 1321-71, have proved meritorious. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978). Yet Congress directed that all inmate grievances are subject to administrative exhaustion. Even if a class of "meritorious" claims could somehow be identified—a highly dubious proposition—there is no plausible reason

why Congress would exempt from the exhaustion requirement those claims, when they may well be resolved most expeditiously by an administrative proceeding rather than litigation. *See Parratt*, 451 U.S. at 529 (inmate suit over lost hobby materials valued at $ 23.50); *cf. Booth v. Churner*, 121 S.Ct. at 1823.

Finally, contrary to the holding and reasoning of the court of appeals, there are numerous instances in which inmates—even those asserting excessive force claims—will be better off if they first use available administrative remedies rather than immediately resort to litigation. As the Judicial Conference recognized, for example, some inmate grievances involve "legitimate claims of assaults or medical needs that should be addressed immediately" through the administrative process. Judicial Conference, *Long Range Plan*, at 64. Subjecting these claims to the inevitable delays inherent in litigation does not serve the interests of prisoners.

Moreover, as a leading inmate litigation handbook explains, "there are some advantages to exhausting [administrative] remedies even if you are not required to do so." John Boston & Daniel Manville, *Prisoner's Self-Help Litigation Manual* 451 (3d ed. 1995).[9] And in those cases in which a

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[9] The *Prisoner's Self-Help Litigation Manual* explains the advantages of exhaustion to prisoner litigants as follows:

> (a) *Exhausting remedies may save you a lot of argument about whether you have to exhaust them.* The time you save by going directly to court may be lost if the defendants file a motion to stay or dismiss your case because you have not exhausted. Even if they are completely wrong and you win, it may take the court a long time to get around to deciding the issue. If you exhaust first, that is one less issue in the way of getting a decision on the merits.
>
> (b) *You might win the grievance.* Even a bad grievance system sometimes makes the right decision, and it is usually a lot easier and faster to get a grievance decision than to prosecute a lawsuit.

grievance is not resolved to the inmate's satisfaction through the administrative process, the PLRA expressly contemplates that litigation can follow.

As the foregoing demonstrates, the court of appeals' creation of an "excessive force" exception to PLRA's exhaustion rule is legally erroneous and counterproductive. The holding of the court below defeats one of the fundamental purposes of the PLRA and, as just noted, will often disadvantage inmates as well. It will without question lead to extensive case-by-case litigation over the elusive question of whether a prisoner's claim involves "'circumstances affecting everyone in the area affected by them,'" and is thus a prison condition subject to section 803(d), or whether it involves " 'single or momentary matter[s]' . . . that are directed at particular individuals" and therefore, in the court of appeals' view, not subject to exhaustion. Pet. App. 9a (citation omitted).

Yet as this Court has recognized, "the distinction between cases challenging ongoing conditions and those challenging

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(c) *You may look better in court.* Some judges believe that many prisoner claims do not really belong in court and that some prisoners use the courts to annoy and disrupt. You may get a more sympathetic reception, and even be viewed as more credible, if you can show that you tried to work out your problem through the established prison channels.

(d) *Even if your grievance is denied, you may obtain information or statements that will help in your lawsuit.* Prison officials may be more honest in responding to a grievance than to a lawsuit because they may not have lawyers telling them what not to say. They might admit, for example, that they have adopted a certain rule to save money. This admission could be very helpful to you if they later claimed in court that they did it for security reasons. You should think very seriously about the advantages of getting their position down on paper before you go to court.

Boston & Manville, *Prisoner's Self-Help Litigation Manual* at 451.

specific acts of alleged misconduct will often be difficult to identify." *McCarthy v. Bronson*, 500 U.S. at 143. In response to a similar argument made in an Eighth Amendment case a decade ago, the Court reasoned:

> The concurrence would distinguish these cases on the ground that they did not involve "conditions of confinement" but rather "specific acts or omissions directed at individual prisoners." It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not . . . .

Wilson v. Seiter, 501 U.S. 294, 299 n.1 (1991) (citation omitted). *Cf. id.* at 303 ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

In *McCarthy v. Bronson*, a case virtually on all fours with this one, the Court unanimously ruled that the statutory term "conditions of confinement" in the statute governing the jurisdiction of U.S. magistrates encompasses an excessive force claim. In *McCarthy* the question presented was whether 28 U.S.C. § 636(b)(1)(B), which "authorized the nonconsensual referral to magistrates for a hearing . . . 'of prisoner petitioners *challenging conditions of confinement*,'" applied to "cases alleging a specific episode of unconstitutional conduct" such as the use of excessive force by prison officials. 500 U.S. at 137-38 (quoting 28 U.S.C. § 636(b)(1)(B)) (emphasis added).

The *McCarthy* Court noted that § 636(b)(1)(B) had been enacted only three years after *Preiser v. Rodriguez* had described several cases involving "challenges to specific instances of unconstitutional conduct . . . as challenges to 'conditions of confinement.'" 500 U.S. at 142 (quoting *Preiser*, 411 U.S. at 498). Observing that "the language in this Act [§ 636(b)(1)(B)] . . . clearly parallels . . . *Preiser*," a unanimous Court rejected the very argument adopted by the decision below—that "Congress used the term 'conditions of confinement' to mean ongoing situations." *Id.* (footnote omitted). The Court reasoned that using "the definition of 'conditions of confinement' that we had used in *Preiser* is consistent" with the Act's purpose of "authoriz[ing] greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload.'" *Id.* at 142-43 (citation omitted). The Court also explained that its holding "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of petitioner's suggested exception for single episode cases." *Id.* at 143.

The term "prison conditions" in PLRA § 803(d) "clearly parallels" the term "conditions of confinement" used in § 636(b)(1) and analyzed in *McCarthy*. *See* 500 U.S. at 142. Just as § 636(b)(1) embraces both "single episode cases" and "specific instances of unconstitutional conduct," 500 U.S. at 142-43, so does the language of the PLRA. Congress enacted the PLRA only five years after the *McCarthy* Court unanimously construed the language of § 636(b)(1)(B) to apply to cases "challenging specific acts of alleged misconduct" such as the excessive force claim at issue in that case. *See* 500 U.S. at 143. Congress had no reason to expect courts to construe the term "prison conditions" in the PLRA any differently.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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